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CURRENT TOPICS.

A DECISION of considerable interest to railway passengers has been recently announced by the Supreme Court of Iowa, in Stone v. C. & N. W. R. R., 10 Ch. L. N. 78. The plaintiff having, as the court found, been lawfully ejected from the defendant's train by the conductor for non-payment of the fare demanded from him, purchased from the ticket agent, at the station where he was put off, a ticket from that place to his destination and boarded the train. The court held that a passenger having been once lawfully ejected from a train for non-payment of fare, has no right, by paying his fare, to enter the same train. Seevers, C. J., said: "In O'Brien v. B. & W. R. R. 15 Gray, 20, the train was stopped and the plaintiff rightfully ejected; and as the train started again, the plaintiff got on the rear car. The conductor being so informed went to such car, and 'although the plaintiff, before any attempt was made to stop the cars a second time, offered to pay whatever fare the conductor should demand,' it was held that the second expulsion was justifiable. It is said by the court: 'After being rightfully expelled from the train he could not again enter the same cars and require the defendant to perform the same contract he had broken.' It is not necessary that we should go so far as was done in the case just quoted, because the plaintiff at no time offered to pay his fare from Marshalltown to State Center. He had just ridden on that train between those points; and, as we have said, when he entered the cars he was bound to pay his fare to his destination; this he contracted to do, and the defendant contracted to carry him on that train and none other. This contract was broken by the plaintiff, and he had no right to insist he should go on that train, at least without paying or offering to pay the fare between Marshalltown and State Center. This ruling by no means excludes him from any other train. * * * The fact that he made use of another agent of the company, other than the conductor, cannot enlarge his rights or change the legal aspect of the case. It must be that the transaction with the agent was a mere continuation of the transaction with the conductor. Both had reference to the right of the plaintiff to ride on that train without the payment of fare from Marshalltown to Boone. The payment of such fare to the agent could not, under the circumstances, give him any more or greater rights than if he had tendered the same amount to the conductor."

SIR JAMES STEPHEN does not allow the question of the codification of the law to be forgotten. In a recent number of the *Nineteenth Century*, he advocates the digesting of the law by private enterprise. Having shown that the Council of Law Reporting was the result of the demands of the profession for cheap, authentic and regular reports of the decisions of the courts, he suggests the establishment of a Council of Legal Literature, the object of which may be best stated in his own words: "If such a body were established, its business would be something of the following kind: Its first duty would be to decide what undertakings it would carry out. Suppose, for the sake of illustration, it determined to proceed with a general digest of the law, and the publication of a series of selected and classified reports on the principles indicated above. The first step would be to procure, from any one who might be regarded as most competent to discharge such tasks, general plans for the work. The plans would then be settled by the council, and the execution of the particular parts of it would be confided to particular persons who might be regarded as most competent, with general directions as to the manner in which the work should be carried out. It would be essential to the carrying out of the scheme to obtain the services of one or more principal editors, under whom the authors of particular branches of the work would act. The preparation of a digest, either of the whole or of any branch of the law, is work of a very peculiar kind. It is one of the very few literary undertakings in which a number of persons can really and effectively work together. Any given subject may, it is true, be dealt with in a variety of different ways; but when the general scheme, according to which it is to be treated, has been determined on—when the skeleton of the book has been drawn out—plenty of persons might be found to do the work of filling up the details, though that work is very far from being easy, or a matter of routine. If, for instance, the following question were to be proposed: 'To what extent is the owner of land entitled to the lateral support of the adjacent land for his land, and for any buildings which he may put upon it?' the answer would have to be obtained from the study and comparison of, say, ten or twelve decided cases, and the principles to which they refer; but almost any competent lawyer who had those cases under his eye, would deduce from them nearly the same general proposition. The place of such a proposition in a general statement of the law of easements, the place of the law of easements in a general statement of the law relating to land, the place of the law relating to land in a general statement of the law relating to property, and the place of the law relating to property in a general digest of the law of England, are questions of quite another order."

THE effect of proceedings in bankruptcy upon the jurisdiction of a state court over claims against the estate is illustrated, in the case of McHenry v. La Societe Francaise, decided by the Supreme Court of the United States at the present term. Mr. Chief Justice Waite delivered the following brief opinion: In Claflin v. Houseman, 93 U. S., 130,

3 Cent L. J. 803 we decided that under the law as it stood previous to the adoption of the revised statutes, the courts of the United States did not have exclusive jurisdiction of suits for the settlement of conflicting claims to property belonging to the estate of a bankrupt, and that an assignee in bankruptcy might sue in a state court to collect the assets. In Mays vs. Fritton, 20 Wall., 414, we also held that if an assignee in bankruptcy submitted himself to the jurisdiction of a state court in a suit affecting the estate which was pending when the proceedings in bankruptcy were commenced, he was bound by any judgment that might be rendered. And in Eyster vs. Gaff, 91 U. S., 525, 3 Cent L. J. 250, Mr. Justice Miller, speaking for the court, said: "The debtor of a bankrupt, or the man who contests the right to real or personal property with him, loses none of his rights by the bankruptcy of his adversary. The same courts remain open to him in such contests, and the statute has not divested those courts of jurisdiction in such actions. If it has for certain classes of actions conferred jurisdiction for the benefit of the assignee in the circuit and district courts of the United States, it is concurrent and does not divest that of the state courts." The principles upon which those cases rest are decisive of this. The complainant having a debt against the bankrupt secured by mortgage, proved the claim against the estate. This, under section 20 of the bankrupt law, 14 Stat., 526, Rev. Stat., sec. 5,075, admitted the complainant as a creditor of the general estate only for the balance of the debt after deducting the value of the mortgaged property, to be ascertained by agreement, sale, or in such other manner as the bankrupt court might direct. The assignee is not required to take measures for the sale of mortgaged property unless its value is greater than the incumberance. His duties relate chiefly to unsecured creditors, and he need not trouble himself about incumbered property unless something may be realized out of it on their account, or unless it becomes necessary to do so in order to ascertain the rights of the secured creditor in the general estate. If he does, and it becomes necessary to adjust the liens before his sale, he may, under the ruling in Claflin vs. Houseman, institute the necessary proceedings for that purpose in the courts of the United States, or of the state, as he chooses. If he does not, and the secured creditor wishes to make his security available, the creditor must act, and, having obtained leave of the bankrupt court to bring his action for that purpose, he may proceed in the state court, if the assignee does not object, or in the courts of the United States, at his election. Here the necessary leave to sue was obtained before the decree was rendered, and the assignee, instead of objecting to the jurisdiction of the state court, consented to that mode of proceeding. The bankrupt and his wife alone objected, but as to them, as we held in Eyster vs. Gaff, the jurisdiction of the state court was not divested by the proceedings in bankruptcy.

THE LIABILITY OF BONDSMEN AS EXECUTORS AND ADMINISTRATORS, AND OF OFFICERS.

Some confusion has sprang up in respect to the obligation of executors and administrators and public officers, in reference to their liability upon their bonds. It has been contended by some that there is no difference or distinction between the two, and that whatever will exonerate the executor or administrator will also absolve the public officer from all obligation upon his bond. But this view is founded upon an entire misapprehension of the characters in which the several parties act, and is not supported by the reasons of the law or the authorities. The line of distinction is marked and palpable, and when closely scrutinized, it is apparent that there is no analogy between the two. The executor or administrator is the personal representative of the deceased; he is a trustee, and occupies the position of a bailee, and being a bailee he is only liable for want of due care and skill, the same as that demanded of bailees for hire, namely that which prudent men exercise in the direction of their own affairs.

Such acts of negligence or careless administration, as defeat the rights of creditors, or legatees, or parties entitled to distribution, amount to a *devastavit*. For if persons accept the trust of executors, they must perform it; they must use due diligence, and not suffer the estate to be injured by their neglect. 3 Wms. Ex'rs, 1908. But where an executor or administrator acts in good faith, he will not be charged with the loss of property belonging to the estate, except upon clear proof of his neglect of duty. Williams v. Maitland, 1 Ired. Eq. 92; Perry v. Maxwell, 2 Dev. Ch. 488; Whitled v. Webb, 2 Dev. & Bat. Ch. 442; Doud v. Saunders, 1 Horp. Ch. 277; Webbs v. Bellinger, 2 Desau. 482; Huson v. Wallace, 1 Rich. Ch. 1; Cartwright v. Cartwright, 4 Hoyn. 134; Calhoun's Estate, 6 Watts, 185; Voorhees v. Stoothoff, 11 N. J. Law, 145. He is entitled to credit for notes lost without his negligence: Strong v. Wilkson, 14 Mo. 116; and for other funds which have become worthless without his default: Pitts v. Singleton, 44 Ala. 363.

Mr. Redfield states his responsibility thus: "He is liable only for want of due care and watchfulness, and reasonable skill and prudence. And the extent of such care and skill will be the same as that of ordinary bailees for hire, that which prudent men exercise in the conduct of their own affairs. Hence the personal representative is not, in the absence of all want of due care and watchfulness, to be held responsible for the loss of money belonging to the estate which is deposited in a bank of good repute, in the official name of such representative. But it is otherwise where the moneys of the estate are mingled in the same account with the private funds of the executor or administrator." 3 Redf. Wills, 394.

Where there is no want of care or watchfulness, and where due diligence and prudence have been used, the exoneration of the executor or adminis-

trator will extend to all cases, whether happening by unforseen accident, such as depreciation in the funds or securities, or by the insolvency of the institution in which money is deposited, or by theft or robbery. In Tif. & Bul., in their treatise on trusts and trustees, it is declared as the settled law that "where an executor has been robbed of money belonging to the estate, without any fault of his own, he will not be held responsible." P. 583.

In Forman v. Coe, 1 Caines, 96, it is held that trust funds in the hands of an executor, lost by robbery, can not be recovered. To the same effect are the cases of Knight v. Lord Plimton, 3 Atk. 480, and Jones v. Lewis, 2 Ves. 240.

The case of the State, etc. v. Meagher et al, 44 Mo. 356, follows the above authorities and decides that executors and administrators are trustees, and are to be regarded as bailees, and are responsible for due care and skill; that is, such as prudent men exercise about their own affairs.

But it is further held that the care to be exercised by a bailee over property in his charge must be graduated according to the character of the property, its value, and the convenience of its being made secure, the facility for its being stolen and the temptations thereto. The same doctrine was held in Fudge v. Durn et al, 51 Mo. 264, and the court said in answer to counsel, who relied upon certain decisions of the U. S. Supreme Court, based on official bonds, "These cases referred to were on official bonds given by receivers, etc., of public moneys, in which that court holds that such officers are in the nature of insurers, and must account for all moneys coming to their hands, no matter how safely kept, and that robbery, theft, etc., are no defence, etc., etc. It is unnecessary to review these authorities, as they do not touch the question before this court." See also Merritt v. Merritt, 62 Mo. 151.

These authorities sufficiently establish the proposition asserted in the outset in this article that executors and administrators are the personal representatives of the deceased, on whose estates they administer, and that they are responsible only as bailees for hire, that is, for the care, watchfulness and diligence which prudent men exercise over their own affairs.

If we now turn to officers having the care and custody of public funds, we shall find that a totally different rule prevails, and that with one or two exceptions the cases are harmonious.

In Supervisors v. Dorr, 25 Wend. 440, it was decided that a public officer intrusted with the receipt and disbursement of public funds, is not responsible for money stolen from his office, where there is no imputation of negligence or other default on his part. This case was affirmed in the Court for the Correction of Errors, 7 Hill, 583, by an equal division of the court, and this last judgment therefore is utterly worthless as a precedent.

But the case of Supervisors v. Dorr was afterwards directly overruled in Muzzy v. Shattuck, 1 Denio. 233. In this last case the action was against a town collector and his sureties, on the official bond executed to the supervisors, brought for the default of the collector in not paying to the county treasurer the money required to be collected by the annual tax list and warrant issued by the board of supervisors; and it was held that it was no defence that the collector had collected the money, and that the same had been stolen from his dwelling-house, "without any fault, want of care or omission of duty" on his part; that the statute imposed a definite liability on the collector and his sureties for the omission to collect and pay over the taxes, and that they were responsible whether the omission was the result of misfeasance, unavoidable accident, or a felony committed by another. This last decision was unanimously affirmed in the court for the correction of errors (see note to 7 Hill, 584), and therefore the authority of Supervisors v. Dorr must be considered as entirely destroyed.

The later decisions are all harmonious the same way. In Com. v. Comly, 3 Penn. St. 372, it was declared that the responsibility of a public receiver depends on his contract, and not on the law of bailment; and where that was to pay over the amount received, it is no defence by his surety that the money was stolen, though the jury find it was kept as a prudent man would keep his own funds. "The responsibility of a public receiver," said Gibson, Ch. J., "is determined not by the law of bailment, which is called in to supply the place of a special agreement where there is none, but by the condition of his bond. The condition of it in this instance was to account for and pay over the moneys to be received; and we would look in vain for a power to relieve him from the performance of it."

The same principle is declared in Inhabitants of Hancock v. Hazzard, 12 Cush. 112, where the court says: "A collector of taxes, by accepting the office, takes the risk of the safe keeping of the money he has actually received. His obligation is not regulated by the law of bailments, and the cases cited to that effect are inapplicable. He is a debtor, an accountant, bound to account for and pay over the money he has collected. The loss of his money, therefore, by theft or otherwise, is no excuse for non-performance. This is founded on the nature of his contract and considerations of public policy."

In Indiana, the court holds that a public officer who is required to give bond for the proper payment of money that may come into his hands, as such officer, is not a mere bailee of the money, exonerated by the exercise of ordinary care and diligence, but his liability is fixed by his bond; and the fact that the money was stolen from him without his fault, does not release him from his obligation to make such payment. Holbert v. The State, 25 Ind. 125.

So in Ohio it is said that the felonious taking and conveying away the public moneys in the custody of a county treasurer, without any fault or negligence on his part, does not discharge him and

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his sureties, and can not be set up as a defence to an action on his official bond. The responsibility of the treasurer in such case depends on his *contract*, and not on the law of bailment. State v. Harper, 6 Ohio St. 607.

The language of the Missouri court is to the same effect: "The defendant's bond was conditioned to discharge the duties of the office of sheriff according to law. It is well established that a public officer who is required to give bond for the performance of his duties, and the proper payment of moneys that may come into his hands as such officer, is not a mere bailee of the money, exonerated by the exercise of ordinary care and diligence. His liability is fixed by his bond, and no parting with the money, or loss either by theft, robbery or otherwise, will release him from his obligation to make payment." State v. Gatzweiler, 49 Mo. 26.

The case of the U. S. v. Prescott, 3 How. 578, was an action brought against the defendant and his sureties for his faithful performance of the duties of receiver. The defence pleaded was that the sum not paid over by the defendant, and for which the action was brought, had been feloniously stolen, taken, and carried away from his possession by some person or persons unknown to him, and without any fault or negligence on his part; and he averred that he used ordinary care and diligence in keeping the said money. To this plea the plaintiffs filed a general demurrer, and on the argument of the demurrer the opinions of the judges in the circuit court were opposed on the question, whether the "felonious taking and carrying away the public moneys in the custody of a receiver of public moneys, without any fault or negligence on his part, discharged him and his sureties, and may be set up as a defence to an action on his official bond." In the supreme court the opinion was unanimous that the plea constituted no defence. Said McLean, J.: "The objection to this defence is, that it is not within the condition of the bond; and this would seem to be conclusive. The contract was entered into on his part, and there is no allegation of failure on the part of the government. How, then, can Prescott be discharged from his bond? He knew the extent of his obligation, when he entered into it, and he has realized the fruits of this obligation by the enjoyment of the office. Shall he be discharged from liability, contrary to his express undertaking? There is no principle on which such a defence can be sustained. The obligation to keep safely the public money is absolute, without any consideration, express or implied; and nothing but the payment of it, when required, can discharge the bond."

In the case of Boyden et al v. United States, 13 Wall. 17, the question was again presented and elaborately argued. The court in its judgment reviewed the leading cases, and finally adhered to the doctrine announced in U. S. v. Prescott. The opinion of Strong, J., is a remarkably clear presentation of the subject, and is very instructive. The question was again presented in Bevans v. U. S., *ibid* 56, and decided the same way.

Not only public policy but the absolute terms of the contract require that officers who give bonds should be firmly held by their conditions. When a person accepts an office where the public funds come into his hands, he is required unconditionally to faithfully keep and disburse them, and no court has a right to relieve him. When he accepts he knows the extent of his obligations, and he should be held strictly to the performance of his contract. The enforcement of this rigid rule alone secures safety to the public.

D. W.

PURCHASE OF HOMESTEAD BY INSOLVENT.

Can a debtor, being insolvent, purchase a homestead and thereby withdraw from his creditors money which would otherwise be destributable among them under the statutes of insolvency? The cases on this point are conflicting,[1] and will hence be examined in detail.

In Randall v. Buffington,[2] the defendant was indebted in the sum of $1,000, which he secured by a mortgage on his homestead, and some time after wards became insolvent; and, after several attachments had been issued against him and levied on his store, he took money which he had and paid off the debt secured by the mortgage. It was held that this appropriation of money was not in fraud of his creditors. The debtor had a right to prefer one creditor to another; and therefore the removal of a lien from his homestead was but the consequence of an act lawful in itself. The court said: "For the disposition of this case, we shall assume the fact that his insolvency was established, and upon this assumption it is difficult to perceive how the payment of a debt which he justly owed, and which was past due can be tortured into an act to hinder delay and defraud creditors. The debt was as sacred as any other debt, the obligation to pay it as binding, and even if its payment constituted a preference, there is no rule of law which prevents a debtor in insolvent circumstances from the application of his property to the payment of one debt rather than another. Dana v. Stanfords et al 10 Cal. 269; Nicholson v. Leavitt 4 Sand. 252; Covanhovan v. Hart 21 Penn. St. 495; Worland v. Kimberlin, 6 B. Monroe, 608; Kennaird v. Adams 11 B. Monroe 102. But it is urged with apparent confidence in the conclusive character of the position, that the payment resulted to the benefit of the defendant as it relieved his homestead of the

(1) The following cases hold, in effect that he can: Randall v. Buffington, 10 Cal. 491; Clpperly v. Rhodes, 53 Ill. 346; North v. Shearn, 15 Tex. 174; Edmonson v. Meacham, 50 Miss. 35: And the following that he cannot: Riddell v. Sherley, 5 Cal. 488; Pratt v. Burr, 5 Biss. 36; Re Wright, 3 Biss. 359.

(2) 10 Cal. 491; opinion by Field, J., Baldwin, J., concurring.

incumbrance, and consequently of liability of being sold for its satisfaction. We confess our inability to see what difference this can make in the transaction. The obligation to pay the debt was none the less binding because it was secured by a mortgage, and if a lien was removed from the homestead it was but the consequence of an act lawful in itself. The payment conferred upon the debtor no new right. He owned the homestead, free from liability, before the debt to the plaintiff was contracted, and he simply restored its former exemption by paying a debt which he had incurred upon its security. The case of Riddell v. Sherley, 5 Cal. 488, is a very different one from this. In that case there was a fraudulent and collusive sale of the debtor's property to discharge liens upon his homestead; the vendee was not a creditor receiving payment of a debt; and no claim against the homestead was asserted. The opinion expressly excepts from its conclusiveness a case like the present. 'To make this case,' very justly observes the learned counsel of the respondent in his brief, 'at all like Riddell v. Sherley, the plaintiff ought to sue Drew to get the money back which the defendant paid him; but the absurdity of such a proceeding is too apparent to need any comment.'"

Notwithstanding the disclaimer of the court in this case, it seems clear that it must be accepted as overruling the earlier case of Riddell v. Sherley, *supra*, determined in the same court. There, a debtor being insolvent or in embarrassed circumstances, sold certain personal property to the plaintiff for the purpose of raising money, with which to discharge certain debts which were a lien on his homestead, in order to save the homestead to himself; of which purpose the plaintiff was apprised. A creditor attached the goods, and the plaintiff brought replevin for them against the sheriff. The court held that the transaction was calculated to hinder, delay or defraud creditors, saying: "Although the law secures the homestead from execution arising from ordinary indebtedness, it is yet made chargeable for debts by the acts of the parties interested in its preservation, and, in some instances, by operation of law. Where such cases exist, it would seem to be only fair that the homestead should remain answerable for the debts charged upon it, and not, after becoming a source of credit, be relieved intentionally, by the disposition of all the other property of the debtor, leaving nothing for the satisfaction of the other creditors. Such a sale, except to a creditor for the payment of *his* debt alone, and free from knowledge of or collusion with the object of the debtor, must be considered a fraud in fact and in law. It is a sale with the direct intent of benefit or advantage to the seller, to the injury of the creditors.[4]"

It is difficult to perceive any essential difference between the quality of the transactions in these two cases. In the one case, an insolvent debtor took money which he had, and with it discharged a lien on his homestead; and, in the other case, he took property which he had, and, by converting it into money, discharged such a lien. If he had turned over the specific property to the lien-holder, the two cases would have been precisely similar; and, in the eye of a court of equity, which looks only to the substance of things, they were not rendered dissimilar by the mere circumstance that the debter first exchanged the property for money with a third person.

In Illinois it is held not to be a fraud upon creditors for an insolvent debtor to purchase a homestead, thus placing beyond their reach the amount of money so expended; and this is so, although he causes the legal title to the property to be vested in his wife, if it was really his intention that the property should be used and held as his homestead.[5]

So in a case in Texas, where judgment creditors sued to subject a homestead to the satisfaction of their debts, it was attempted to prove that the defendant, when he contracted the debts, was a single man, not entitled to any homestead; that he went about erecting his dwelling, now claimed as his homestead, when in failing circumstances, with the means for which he had contracted the debts, and with a knowledge of his inability to pay them; and that he then married, and thus acquired the homestead in fraud of his creditors. It was held that such evidence could not be heard. "If," said the court, "none but the fraudulent debtor were interested in the homestead, there would be more force in the argument that he could not claim the exemption. But it is not given or intended for the sole benefit of the husband or head of the family. The wife has, at least, an equal interest in the exemption of the homestead; and it was not proposed to prove that she had been a participant in any intentional fraud practiced upon the plaintiffs. But if this had been proposed, we are of opinion that the court very properly refused to let in such inquiries. It would have exposed to animadversion the motives with which the defendants contracted marriage, with the view to affect their rights subsequently acquired. The law protects

(4) Opinion by Heydenfelt, J., Murray, Ch. J., concurring.

(5) Cipperly v. Rhodes, 53 Ill. 346, opinion by Breese, Ch. J. "No question is made," said thecourt "that the homestead right would have existed in Rhodes [the debtor] had he taken the deed to the property in his own name, instead of taking it in the name of his wife. He paid the purchase money wholly out of his own funds at a time he had a right to obtain a homestead which would not be liable for his debts then existing, or to be subsequently contracted; and the sole question is whether taking the deed to his wife placed the property beyond the protection of the homestead law. This is an inquiry into which the *animus* enters largely. Did he purchase it as, and for a homestead, and has it been so used and held. If such was his intention, then, taking the deed to his wife should not, we think, cut off that right. If the design was simply to acquire property which he could hold in fraud of creditors, then the law would strip it of its covering, and subject it to the payment of his debts. But it must be remembered that it was not a fraud on his creditors to buy *a homestead* which would be beyond their reach.'

the homestead as well against debts contracted before as after it was acquired. To admit evidence and inquiries of the character proposed, would have a manifest tendency to destroy the sanctity and inviolability which the law attaches to the right of homestead; and, indeed, the practical effect would be to deny an unfortunate debtor, in failing circumstances, the right to provide a house for the protection and shelter of his wife and children. We can not give our assent to such a principle."[6]

In addition to the overruled case in California already mentioned,[7] there is a case determined in the Circuit Court of the United States for the District of Wisconsin, in 1857, in which the defendants, who were merchants, replenished their stock by purchasing goods of the complainants on credit. After acquiring possession of the goods so purchased, they transferred their whole stock, in fraud of their creditors, as was alleged, taking in exchange therefor a house and lot which, as against a judgment obtained by these creditors, they claimed exempt as their homestead. It was held that this could not be done. "The mere statement of the facts," said the court, "decides this case in the conscience of every honest man, that neither in law nor justice the exemption should be allowed. The defendants cannot expect the court to assist them in perpetrating the intended fraud. A party cannot turn that which has been granted him for the comfort of himself and family into an instrument of fraud."[8]

In a well considered case in Mississippi the principle is said to be that "a debtor may innocently subtract from his resources such means as may be reasonably necessary for the support of his family. His creditors, therefore, can not pursue and reach the money of the husband and father, paid for such necessary purposes as the maintenance of the family and education of the children. But, subject to that right, the debtor must devote his property and means to his creditors. If the husband takes money, which ought to pay his debts, and invests in the purchase of real estate or other property, for wife and children, the transaction may be fraudulent or not, as the husband may be indebted or not, and then by a comparison of his debts with the resources retained by him. If he was insolvent at the time of the purchase, the evidence is overwhelming and conclusive that the motive was to make a gift at the expense of creditors, and that the intent was to withdraw his means from their reach." Nevertheless, in this case the court sustained a claim of homestead in property which an insolvent had purchased, taking title in the name of his wife and children, it being occupied by the family as their home.[9]

The foregoing cases would, of course, have no application under a statute like that of Iowa, which denies the homestead exemption in case of debts contracted prior to the purchase of the property in which the homestead is claimed; nor is it designed to include in this paper that numerous class of cases which relate to fraudulent conveyances of homesteads *already acquired*, and where the right of the debtor to the exemption could not have been resisted, if the conveyance had not been made.

(6) North v. Shearn, 15 Tex. 174; opinion by Wheeler, J.

(7) Riddell v. Sherley, 5 Cal. 488.

(8) Pratt v. Burr, 5 Bissell, 36; opinion by Mr. District Judge Miller.

(9) Edmonson v. Meacham, 50 Miss. 34.

EQUITABLE ASSIGNMENT.

EX PARTE TREMONT NAIL COMPANY. *RE* MIDDLEBORO SHOVEL COMPANY.

United States District Court, District of Massachusetts, November 22, 1877.

Before Hon. JOHN LOWELL, District Judge.

A MERE PROMISE to pay out of a particular fund, when received, the promisor retaining control over the fund, and no notice being given to the person who is to pay it, does not work an equitable assignment.

The bankrupts were a copartnership carrying on business under the firm name of the Middleboro Shovel Company. On the 28th day of June, 1877, Mr. Richardson, one of the partners, happened to meet in the cars Mr. Tobey, the treasurer of the Tremont Nail Company, and told him that he wanted to borrow about a thousand dollars to save him a journey to New York, where he could obtain it; that if the Tremont Nail Company would lend him the money it would be repaid out of the first money received from John Dunn, of New York, for whom they were filling a large order. The loan was made, and a note for thirty days was given for it. A few days after this Mr. Richardson went to New York and found that the agents of his firm there were embarrassed and about to fail, or had failed. He received an advance of $1,700 from Mr. Dunn, and returned to Boston on the 4th day of July, and consulted with his partner about their affairs. On the 5th of July he saw Mr. Tobey and told him of the failure of his agents, and that he did not know how it would affect his firm, and whether he ought to pay Mr. Tobey or not; but the conclusion reached at that time was that the firm would go on for the present. Early on Friday morning, July 6th, the money was paid to Mr. Tobey, and on the same day the firm stopped payment. Negotiations were entered into for a settlement with their creditors, in the course of which complaint was made of the payment to the petitioners, and the money was then repaid to the Middleboro Shovel Company, with an express written agreement that the repayment should not prejudice the rights of the petitioner, but that they should "stand on precisely the same condition in which they would have remained if the said sum of nine hundred and ninety-four dollars and ninety-two cents had not been paid to the said Tremont Nail Company upon the said 6th of July, but had been laid aside, subject to the decision of a court of law in reference to its disposal."

The Shovel Company afterwards went into bankruptcy, and the Tremont Nail Company proved a debt against their estate upon certain other notes, concerning which there was no dispute, and claimed that this note should be admitted as a privilege debt, to be paid in full. The case was heard by consent of parties upon oral evidence instead of a special case.

B. L. M. Tower for the petitioners.

1. Security given or payment made in pursuance of

a valid and definite agreement entered into when the loan is made, is always valid, though the debtor may have become insolvent in the meantime. Burdick v. Jackson, 15 N. B. R. 318, and cases there cited; *Re* Jackson I. M. Co., 15 N. B. R. 438; Cook v. Tullis, 18 Wall. 322; *Ex parte* Fisher, L. R. 7 Ch. 636.

2. The agreement gave the petitioners an equitable assignment of the money to come from Dunn. Story, Eq. §§ 973, 1044, and cases; Smith Manuel Eq. p. 245; 2 Spence, Eq. 860.

3. Notice to the debtor is not essential to the valid assignment of a debt. U. S. v. Vaughan, 3 Binney, 394; Muir v. Schenk, 3 Hill, 228; Littlefield v. Swinton, 17 Maine, 327; Dix v. Cobb, 4 Mass. 508; Warren v. Copelin, 4 Met. 594; Wood v. Partridge, 11 Mass. 488.

4. Assignment of part of a debt is good in equity. Morton v. Naylor, 1 Hill, 583; Cleaves v. Davids, 5 Binney, 392; Burn v. Carvalles, 4 M. & C. 699; Crain v. Paine, 4 Cush. 483.

T. K. Lothrop and *R. R. Bishop* for the assignee cited Row v. Dawson, 2 Lead. Cas. Eq., Christmas v. Russell, 14 Wall. 70; Hall v. Jackson, 20 Pick. 194; Field v. Megaw, L. R. 4 C. P. 660; Malcom v. Scott, 3 Hare, 39, and notes to Am. Ed.

LOWELL, J.

The agreement of the parties seems to have interpreted the contingency which has arisen of the Shovel Company becoming bankrupts, and, I think they intended to leave the case as it would have been if Dunn had paid his debt into court, leaving the parties to interplead upon the equitable title. In other words, that the payment should go for nothing. Virtually admitting that considered as an ordinary payment, it would be a preference. In this I have no doubt they were wise, for the payment was made under circumstances which would warrant a jury to find accordingly, on the part of the petitioner, that they were obtaining an advantage over the other creditors, and that the debtors were probably insolvent.

The parties have acted throughout in the utmost good faith, and there is a strong moral equity, so to call it, for the petitioners; but the question is whether they had what, in equity as admitted in the courts, amounts to an assignment of part of the debt due from Dunn.

A learned judge has said that the law of equitable assignments is brought to such an exquisite degree of refinement, that it is by no means easy to understand it. Field v. Megan, L. R. 4 C. P. 664, per Brett, J.; and another judge in a case, which in one aspect resembles the one at bar, said that the lien might depend on whether the word used was "will" or "shall," in an oral agreement collateral to a negotiable instrument Thompson v. Simpson, L. R. 5, Ch. 662. In the case first above cited, the decision was that a promise to pay when a certain debt is received, is not an equitable assignment of the debt. Two of the judges in that case intimate that a promise to pay *out of* a particular debt or fund would work a transfer. A like *dictum* was made by Lord Truro, in Rodich v. Sandell, 1 De. M. & G. 777, and this was followed by a decision of a learned vice chancellor, afterwards lord chancellor, founding himself solely on this dictum. Riccard v. Pritchard, 1 Kay & J. 277; but he overruled the decision of a very eminent chancellor to the contrary: Bradley's case, Ridgw. (Temp. Hardw.) 194.

The refinement appears in this: that while an agreement to pay out of a fund is on the border line, it is held both in England and the United States any order or assignment, oral or written, to pay out of a particular fund, made upon the debtor or holder of the fund, or an agreement to give such an order, or a mere oral direction to go and receive the money and pay such and such debts with it, does operate as an equitable assignment. See Diplock v. Hammond, 2 Sm. & G. 141, affd; 5 De. M. & G. 320; Gurnell v. Gardner, 4 Giffard, 626; Hunt v. Mortimer, 10 B. & C. 44; Exp. Barton, 4 Dea. & Ch. 120; Bk. of U. S. Huth, 4 B. Mon. 448; Newby v. Hill, 2 Met. (Ky.) 530; Rogers v. Rust, 9 Paige, 243.

In the United States, it was held many years ago that a mere promise to pay out of a particular fund, when received, the promiser retaining control over the fund, and no notice being given to the person who is to pay it, would not work an equitable assignment. Rogers v. Horach, 18 Wend. 319. This case was remarked upon by the chancellor in Richardson v. Rust, 9 Paige, 243, but it has been followed in all the cases which I have seen, and appears to be the settled law of this country. See Hoyt v. Story, 3 Barb. 262; Christmas v. Russell, 14 Wall. 69; Trist v. Child, 21 Wall. 447, per Swayne, J.; Christmas v. Guild, 8 Ohio St. 563; Harrison v. Connolly, 16 La. Ann. 41; Eib v. Martin, 5 Leigh, 132; Forde v. Garner, 15 Ind. 298; Pearce v. Roberts, 27 Mo. 179.

With these cases before me, I can not hold that the agreement between these parties gave any lien or charge on Dunn's debt in favor of these petitioners, and their petition to stand as privileged creditors is *denied*.

CHARTERS OF CORPORATIONS — POWERS OF LEGISLATURES.

STATE OF NEW JERSEY v. YARD.

Supreme Court of the United States, October Term 1877.

1. A STATUTE OF A STATE which declares that all charters of corporations granted after its passage may be altered, amended, or repealed by the legislature, does not necessarily apply to supplements to a charter already passed, though the supplement be subsequent to the statute.

2. NOR DOES A PROVISION IN A SUPPLEMENT TO THE CHARTER, which says that "*this supplement and the charter to which it is a supplement*, may be altered or amended by the legislature," apply to a contract with the company made in a supplement passed long after.

3. RESERVATIONS OF RIGHT TO REPEAL—SUCCEEDING LEGISLATURES.—Such reservations of the right to repeal found in statutes, unlike similar provisions in the constitution of a state, are only binding on succeeding legislatures so far as they chose to adopt them, and a legislative contract may be made which is not repealable if the legislature so intend. It is, therefore, in every case a question whether the legislature making the contract intended that the former provision for repeal or amendment should become a part of the new contract by implication.

4. CASE IN JUDGMENT.—In this case the contract of 1865 for a specific rate of taxation was inconsistent with any such implication because: 1. There was a subject of dispute, and a fair adjustment of the controversy for a valuable consideration on both sides. 2. The contract assumed, by the requirements of the legislation, the shape of a formal written contract signed by both parties. 3. The terms of the contract, that "this tax shall be in lieu and satisfaction of all other taxation or imposition whatsoever by or under the authority of this state or any law thereof," when viewed in the light of the whole transaction, do not admit the idea of the right of the state to revoke it at pleasure.

IN ERROR to the Court of Errors and Appeals in and for the State of New Jersey.

Mr. Justice MILLER delivered the opinion of the court.

This is a writ of error to the Court of Errors and Appeals of the State of New Jersey.

The plaintiff invokes the jurisdiction of this court on the ground that an act of the legislature of that state, approved April 2, 1873, concerning taxation of

railroad corporations, impairs the obligation of a contract between the state and the plaintiff, found in an act of March 23, 1865, and the written acceptance of that act by the company, dated April 24 of that year.

The third section of the act of 1865 reads as follows: *Be it enacted*, That the tax of one-half of one per cent. provided by their said original act of incorporation, to be paid by the said company to the state whenever the net earnings of the said company amount to seven per cent. upon the cost of the road, shall be paid at the expiration of one year from the time when the road of the said company shall be open and in use to Phillipsburgh, and annually thereafter, which tax shall be in lieu and satisfaction of all other taxation or imposition whatsoever, by or under the authority of this state, or any law thereof; *provided* that this section shall not go into effect or be binding upon the said company, until the said company, by an instrument duly executed under its corporate seal, and filed in the office of the secretary of state, shall have signified its assent hereto, which assent shall be signified within sixty days after the passage of this act, or this act shall be void.

The act of 1873 imposed a more burdensome tax than this on all railroad companies not protected by irrepealable contracts, and the court of errors held that this statute was applicable to the plaintiff, because the contract of 1865, which had been formally accepted by the company, was repealable by the legislature of the state.

The single question, therefore, for our consideration is whether the act of March 23, 1865, and its acceptance by the Morris and Essex Railroad Company, constituted a contract which could not be impaired by any subsequent legislation of the state.

The contrary of this was maintained by the court of errors, on the ground that while the act of 1865 was a contract, it must be taken in connection with other legislation of the state on that subject, by which the legislature reserved the right to alter or amend the contract, and that this right entered into and became a part of it. Therefore the exercise of this right did not impair its obligation.

The solution of the question here presented must depend, first, upon an enquiry into this supposed reservation of power, and, secondly, into the essential character of the contract of 1865.

The case before us differs from those in which, by the *constitution* of some of the states, this right to alter, amend and repeal all laws creating corporate privileges becomes an alienable legislative power. The power thus conferred can not be limited or bargained away by any act of the legislature, because the power itself is beyond legislative control. The right asserted in this case to amend or repeal legislative grants to corporations being itself but the expression of the will or purpose of the legislature for one particular session or term of the State of New Jersey, can not bind any succeeding legislature which may choose to make a grant or contract *not* subject to be altered or repealed. Or, if any succeeding legislature to that of 1846, which enacted that "the charter of every corporation which shall *hereafter* be granted by the legislature shall be subject to alteration, suspension and repeal in the discretion of the legislature," shall grant a charter or amend a charter declaring in the act that it shall *not* be subject to alteration or repeal, the former act is of no force in that case. So it can by a general law repeal this general reservation of the right to repeal, and all special reservations in separate charters. It follows that, unlike the constitutional provision in other states, it is in New Jersey a question in every case of a contract made by the legislature, whether that *body intended* that the right to change or repeal it should inhere in it, or whether, like other contracts, it was perfect and not within the power of the legislature to impair its obligation.

The Morris and Essex Railroad Company was chartered by an act of the legislature, January 29, 1835. Section sixteen enacts that "as soon as the net proceeds of said railroad shall amount to seven per centum (in any one year) upon its cost, the said corporation shall pay to the treasurer of the state a tax of one-half of one per centum on the cost of said road, to be paid annually thereafter on the first Monday of January of each year; provided, that no other tax or impost shall be levied or assessed."

By section twenty "the legislature reserved to themselves the right to alter, amend, or repeal this act whenever they think proper." The next succeeding legislature, in a supplement to the charter, repealed section twenty and substituted this language: "The legislature reserve to themselves the right to alter or amend *this supplement* or the act to which *this a supplement*, whenever the public good may require it." It is this last clause which counsel insist became, by operation of law, a part of the contract concerning taxation of the act of 1865, already quoted.

The argument is that the original charter, and all subsequent amendments and supplements, are to be treated merely as parts of one act, and this reserve of the right to alter or amend became a part of every new law which has reference to that railroad company. In support of this proposition the cases of Newark City Bank v. The Assessor, 1 Vroom, 22, and The State v. Bergen, 5 Vroom, 439, are cited. They announce the general principle that a charter and its amendments are to be considered as acts *in pari materia* in construing them, and they do little more. The precise point held is, that a city charter, being declared to be a public act, supplements and amendments to it are also to be treated as public acts. But this falls short of establishing the principle that a reservation in a charter to a private corporation, of the right to repeal or amend it, shall extend to every subsequent amendment of the charter. It is not easy to see why such a provision should be extended beyond the terms in which it is expressed; and all the force which properly belongs to it is given when the exemption from the constitutional provision against impairing the obligation of contracts is extended as far as the language of the exemption justifies, and it should be extended no further by implication. The language in the statute we are construing covers the supplement of 1836 and the original act, and nothing more—"the right to alter or amend *this supplement, or the act to which this is a supplement*"—leaving future supplements to make the same reservation, if the legislature so intends.

Section six of the general act of 1846 is by its terms limited to charters of corporations granted after its passage, and it requires a very strong implication to make it applicable to amendments to charters in existence before its passage, though the amendments were executed subsequently. But, as we have already said, since the legislature which passed the act of 1865 had the power to make a contract which should not be subject to repeal or modification by one of the parties to it without the consent of the other, the main question here is, did they intend to make such a contract?

The principal function of a legislative body is not to make contracts, but to make laws. These laws are put into a form which, in all countries using the English language and inheriting the English common law, is called a statute. Unless forbidden by some exceptional constitutional provision, the same authority which can make a law can repeal it. The Constitution of the United States has imposed such a limitation upon the legislative power of all the states by declaring that no

state shall pass any law impairing the obligation of a contract. The frequency with which this court has been called on to declare state laws void, because they do impair the obligation of contracts, shows how very important and far-reaching that provision is. It may safely be said that in far the larger number of cases brought to this court under that clause of the Constitution the question has been as to the existence and nature of the contract, and not the construction of the law which is supposed to impair it; and the greatest trouble we have had on this point has been in regard to what may be called legislative contracts—contracts found in statute laws of the state if they existed at all. It has become the established law of this court that a legislative enactment, in the ordinary form of a statute, may contain provisions which, when accepted as the basis of action by individuals or corporationts, become contracts between them and the state within the protection of the clause referred to of the Federal Constitution.

The difficulty in this class of cases has always been to distinguish what is intended by the legislature to be an exercise of its ordinary legislative function in making laws, which, like other laws, are subject to its full control by future amendments and repeals, from what is intended to become a contract between the state and other parties when the terms of the statute have been accepted and acted upon by those parties. This has always been a very nice point, and when the supposed contract exists only in the form of a general statute, doubts still recur after all our decisions on that class of questions. These doubts are increased when the terms of the statute relate to a matter which is in its essential nature one of exclusive legislative cognizance, and which at the same time requires money or labor to be expended by individuals or corporations. In such cases the legislature may be supposed to be merely exercising its power of regulating the burdens which are to be borne for the public service, in which case it could be modified from time to time as legislative discretion might determine, or it might be a contract founded on fair consideration coming from the party concerned to the state, and which in that case would be beyond the power of the state to impair. Statutes fixing the taxes to be levied on corporations, partake, in a striking manner, of this dual character, and require for their construction a critical examination of their terms and of the circumstances under which they are created.

The writer of this opinion has always believed, and believes now, that one legislature of a state has no power to bargain away the right of any succeeding legislature to levy taxes in as full a manner as the constitution will permit. But so long as the majority of this court adhere to the contrary doctrine, he must, when the question arises, join with the other judges in considering whether such a contract has been made.

In the case now under consideration, it is conceded on all hands that the act of 1865 was a contract for a tax of one-half of one per centum per annum on the cost of the Morris and Essex railroad, and no more. But counsel for defendent say the contract was repealable; that the legislature of its own volition could impose other and more burdensome taxes at its discretion; that it was a contract so long as the legislature of New Jersey was satisfied with it, and no longer. It is conceded, also, that this construction of it cannot be sustained, unless we are bound to import into it, either the reservation clause of the act of 1836, or what is called the interpretation act of 1846. We have already shown how little reason there is for doing this on general principles of construction. We think it still clearer that it cannot be done, because it is inconsistent with the legislative intent in passing the act of 1865.

1. The legistature was not willing to rest this contract in the usual statutory form alone, depending for its validity as a contract upon some action of the corporation under it to bind it to its terms, but they required of the company a formal written acceptance within sixty days, or else it became wholly inoperative. The company duly executed this acceptance. There was, then, the complete formal written instrument evidencing this contract, signed by the presiding officers of the two houses of the New Jersey legislature, and the governor, for one party, and the president and secretary and seal of the railroad company, of the other party. It does seem as if the legislative intention was to make a *contract* in the same manner, and in the same terms, of equal obligation, as other contracts are made, and not to pass a statute which it could repeal or amend the day after it was signed by the parties.

2. There was a well-understood subject of contract. The corporation wished authority to build a branch road or roads, with favorable route, and power to acquire right of way, and the state wishes the vexed question of the right to tax the corporation to be settled. For the company denied the right of the state to tax them under their charter, until the road paid them a net income of seven per cent. per annum on its cost.

The legislature said, if you will consent to pay the one-half of one per cent. tax, as originally agreed, and commence to do this within one year from the time the road shall be open and in use to Phillipsburgh, we will authorize an increase of ten millions of your capital stock and the franchises you seek as to the branch roads, and will agree that the tax shall be fixed at one-half of one per cent. Here was a subject of disagreement adjusted, additional rights granted, and the tax fixed, both as to its rate and the time of commencement. Can it be believed that it was intended by either party to this contract that after it was signed by both parties one was bound forever and the other only for a day? That it was intended to be a part of the contract that the State of New Jersey was at her option to be bound or not? That there was implied in it, when it was offered to the acceptance of the company, the right on the part of the legislature to alter or amend it at pleasure? If the state intended to reserve this right, what necessity for asking the company to accept in such formal manner the terms of a contract which the state could at any time make to suit itself?

3. The *language* used by the legislature is inconsistent with the right claimed. "Which tax (one-half of one per cent.) shall be in lieu and satisfaction of all other taxation or impositions whatsoever by or under authority of this state or any law thereof." Is there here to be implied "except such laws as may hereafter be enacted?" Such a provision would be to nullify the whole contract. How could the tax be in lieu and satisfaction of all other taxation, if other taxes might be imposed next day? Or how can it be said to be in satisfaction of all taxes whatsoever, under authority of the state, if the state could immediately impose another and more burdensome tax?

We admit the force of the doctrine that, when it is asserted that a state has bargained away her right of taxation in a given case, the contract must be clear, and can not be made out by dubious implications.

But of the existence of the present contract there is no doubt. Its meaning and its terms are clear enough, and, taken alone, no one denies but that it is a contract which would be protected by the Constitution of the United States. The implication is of a right to revoke it, and comes from the other quarter, and is one which we do not think exists by fair construction, and which we do not feel at liberty to import into the contract to defeat its manifest purpose.

The judgment of the court of errors and appeals is reversed, and the case remanded for further proceedings in conformity to this opinion.

XUM

Mr. Justice BRADLEY took no part in the consideration of this case.

LIFE INSURANCE—MISSOURI ACT AS TO MISREPRESENTATIONS IN POLICIES CONSTRUED.

WHITE v. CONNECTICUT MUTUAL LIFE INSURANCE COMPANY.

United States Circuit Court, Western District of Missouri.

Before HON. JOHN F. DILLON, Circuit Judge, and HON. ARNOLD KREKEL, District Judge.

1. MISSOURI ACT—CONTROLS SUBSEQUENT POLICIES.—The act of the Legislature of the State of Missouri of March 23d, 1874, in respect of policies of life insurance extends to all policies delivered in this state after the act went into effect.

2. CONFLICT BETWEEN PROVISIONS OF ACT AND OF POLICY.—Where the provisions of that act are in conflict with the provisions of the policy, the act controls the policy.

3. WAIVER.—Whether the applicant for insurance may waive the benefit of the act *quære*; but no such waiver arises by implication.

4. THE ACT EXTENDS TO warranties as well as to representations.

5. THE PURPOSE AND POLICY of the act expounded.

Action by the plaintiff as administratrix of the estate of her late husband, John H. White, on a policy of insurance, dated October 2, 1874, upon the life of the said White for the sum of $10,000. The assured was a citizen of Missouri, and the policy was issued and delivered to him in this state. When it was so delivered the act of March 23, 1874, was in force. This act is as follows:

Section 1. No misrepresentation made in obtaining or securing a policy of insurance on the life or lives of any person or persons shall be deemed material, or render the policy void, unless the matter misrepresented shall have actually contributed to the contingency or event on which the policy is to become due and payable; and whether it so contributed in any case shall be a question for the jury.

Sec. 2. In suits brought upon life policies heretofore or hereafter issued, no defense based upon misrepresentation in obtaining or securing the same shall be valid, unless the defendant shall, at or before the trial, deposit in court, for the benefit of the plaintiffs, the premiums hereafter received on such policies, with six per cent. interest per annum from the date of receipt.

Sec. 3. This act shall take effect and be in force from and after its passage.

The defendant company answers, setting forth that the policy contained a provision or condition, as follow: "That the answers, statements, representations and declarations contained in or indorsed upon the application for this insurance—which application is hereby referred to and made a part of this contract—are *warranted* by the assured to be true in all respects, and that if this policy has been obtained by or through any fraud, misrepresentation or concealment, then this policy shall be absolutely void." The answer further alleges that in the application for the policy, the assured falsely answered that he had never had asthma; also falsely answered that he had never been addicted to the use of alcoholic beverages; also falsely answered that he had not been attended by a physician for a long time; also falsely answered that he had no usual medical attendant. These several answers of the assured contained in the application, are alleged to be false, but the counts in the answer of the defendant demurred to, do not contain an allegation that the matters misrepresented contributed to the death of the assured, or that the said misrepresentations were fraudulently made with a view to deceive or mislead the company.

The plaintiff demurs.

Clark, Waters & Winslow, for the plaintiff; *Lee & Adams* and *Botsford & Williams* for the defendant.

DILLON, Circuit Judge:

The statute of March 23, 1874, is silent as to what shall be the effect if the policy contains conditions in conflict with it. And the policy in suit contains no express reference to the statute, and no express waiver by the assured of its provisions. If the statute applies, the counts of the answer to which the demurrer relates are not sufficient, because there is no averment that the matters misrepresented were material. If the statute does not apply to this contract and control the rights of the plaintiff, the answer is sufficient without such an averment. We have, therefore, two leading questions presented:

1st. Whether the statute controls the provisions of the policy, or whether the provisions of the policy inconsistent with those of the statute, control the latter. If the statute controls the policy where the two are in conflict, then

2d. Whether the statute by its true construction embraces within its remedial provisions *warranties*, as well as *representations* as these as known to the law of insurance.

In Chance v. Union Mutual Life Insurance Company, the Circuit Court of the Eastern District of Missouri (Dillon and Treat, Judges); at the September term, 1876, ruled the following points under the enactment here in question:

"1. A contract of life insurance made by a foreign company doing business in Missouri, and countersigned and delivered in this state by the local agents of the company to, and insuring, a citizen, inhabitant or other person in the state, falls within the Missouri act of March 23, 1874, if delivered after that act went into effect. As to such policies, the act is to be treated as incorporated therein.

2. That act extends to all misrepresentations made in obtaining or securing the policy. Whether the act extends to *warranties*, this case does not require the court to decide.

3. A defense based upon section one of that act must, in addition to alleging the misrepresentation, allege also that the matter misrepresented actually contributed to the contingency or event on which the policy is to become due and payable, and whether it so contributed is made by the act a question for the jury; hence it is necessary for the defendant to make the averment that the matter misrepresented contributed to the contingency or event insured against.

4. It is not necessary to the sufficiency of an answer based upon section one of the act that it be alleged that the premiums required to be deposited by section two have been actually deposited in court for the plaintiff. This may be done at any time 'at or before the trial.' If not done, the court can deal with the omission in a summary manner."

Subsequently, in Lowell v. Alliance Life Insurance Company, decided at the same term, Judge Treat held that the statute extended to *warranties* the same as to representations. 3 Cent. L. J. 609.

No opinions were written in those cases, and the counsel for the company in the case at bar present the questions anew in this court, whether the statute or the contract fixes the rights of the parties where the two are inconsistent, and whether the statute extends to warranties. These questions we proceed briefly to examine in the order stated.

1. As bearing upon both of these inquiries it is essential to ascertain the mischief which this remedial statute was designed to cure, in order that the statute may be construed, so far as its terms will permit, to suppress the mischief and advance the remedy.

Within the last twenty-five years life insurance has attained such a vast growth as to have important public relations. It has become a usual and favorite means for making provisions for the wife and children, and creditors of the assured. Life insurance companies are in the nature of savings banks, in which are invested much of the surplus earnings of the people. Universally, the companies in taking the policies make it a practice to put a large number of questions to the applicant touching a great variety of matters, some of which are material, but many of which bear remotely, if at all, upon the real risk assumed. In the policy here in suit eighty-six questions are answered.

This practice, within proper limits, is not objectionable. But when the answers are obtained, the companies almost universally insert a condition in the policy to the effect that the application is made a part of the policy, and each of the answers a *warranty* on the part of the assured. The effect of this is that if any one answer, however immaterial to the risk, is not literally true, there can be no recovery, although the assured was honestly mistaken, and had paid his premiums for years, and the mistaken answer in no way related to the cause of the death of the assured. This was bad enough, but in more recent years many of the companies have proceeded further, and in effect have inserted provisions in their policies putting all statements or representations made in effecting an insurance on the footing of warranties, and the courts have felt constrained to uphold the contract as framed. Take as conspicuous examples the leading case of Anderson v. Fitzgerald, 4 House of Lords, Cases 484, and Jeffries v. Life Ins. Co., 22 Wall. 47.

The policies in these cases contained a provision that if the statements in the application were not true the policies should be void; and the policies were held void for the false statement of a fact, although it was not material to the risk, and although it was not in terms declared to be a warranty.

The legislature of Missouri conceived, and we think wisely, that the promises held forth to the assured in the policies in general use were but too often a delusion and a snare, and as the courts were powerless to correct the evil, it ought to be corrected by statute. It is stated by counsel that the act of March 23, 1874, was occasioned by the decision of the circuit court in Jeffries' case, above mentioned; and this is not improbable.

In the light of these considerations, the purpose and meaning of the statute are not to be mistaken. True, the statute is not framed with the utmost care, nor with nice precision in the use of language. If more caution had been taken, it would have contained a clause that all subsequent policies should be subject to its provisions and also words in terms extending its operation to warranties.

And if it had been dictated by a just regard for the rights of the companies, it would have excepted willful and fraudulent representations from its operation, although it is probable that the courts may hold that such is its true construction.

We are of opinion that policies issued and delivered in Missouri, after that act took effect, fall within its protective operation; and as to such policies the act is to be treated as if incorporated therein, certainly, unless there is an express provision in the policy to the contrary, if it be competent, indeed, to insert such a provision. Our attention has been called to a late decision of the Court of Appeals of Kentucky, in which a conclusion is reached that seems to be in conflict with the view above expressed. Farmers, etc., Ins. Co. v. Curry, 10 Ch. L. N. 43. It is seldom that we feel constrained to differ with the deliberate judgment of that learned and able court, but in this instance we are not convinced by its reasoning. Its conclusion thwarts what appears to us the manifest purpose of the enactment. An exactly opposite conclusion was reached by the Supreme Court of New Hampshire, under precisely the same kind of an enactment. Chamberlain v. Ins. Co., 55 N. H. 249, 264; General Stats. N. H., ch. 157, p. 325; Emery v. Piscataqua, etc., Ins. Co., 52 Maine, 322.

It is by no means clear that a principle of public policy is not involved in such an enactment as that of the Missouri Legislature here in question. If such a statute is founded upon public policy, even an express waiver of its benefits would be inoperative—as much so as if a borrower should expressly waive the statute against usury, although the statute is intended for his benefit. But, conceding that the statute is not so founded on public policy as that its benefits may not be renounced, still the general rule is that laws in existence are necessarily referred to in all contracts made under such laws, and that no contract can change the law. Such is the general rule. The exception is that where no principle of public policy is concerned, a party is at liberty to waive a statutable provision intended for his benefit. But the intention to waive such benefit ought to be clear. Now, to hold that a party, by merely accepting a policy in the form in use before the statute was adopted, (which produced the very mischief aimed at by the legislature), waives the intended protection of the statute, is to defeat the precise end that the legislature had in view. It is to perpetuate the mischief and to nullify the remedy.

II. The second question, viz: Whether the Statute of Missouri extends to warranties as well as representations, has given us more difficulty. It will be noticed that the statute does not use the word "representations," but "misrepresentations," and it extends to *all* such made in "obtaining or securing" the policy.

In view of the quite general provisions of policies to the effect that all declarations and statements, if untrue, shall avoid the policy, whether material or not, see Anderson v. Fitzgerald, *supra;* Conover v. Mass. Insurance Company, 3 Dillon, 217, and cases cited; Jeffries v. Insurance Company, *supra*, and whether, in terms declared warranties or not, we are of opinion that the evil which the legislature intended would not be met, if we should restrict the operation of the statute to representations strictly so-called as distinguished from warranties.

As between warranties and representations, where these were kept distinct, the mischief which was felt grew out of the principles applicable to the former rather than the latter. Indeed, it is the doctrine of warranties, or rather the practice of the companies in requiring such a large number and variety of questions to be answered, and then inserting a condition in the policy that all such answers are warranties, that wrought the most injustice. And we can not readily suppose that the legislature, in laying the remedial ax to this matter, intended to strike at the comparatively harmless doctrine of representations proper, and to leave the tap-root of the mischief arising out of warranties untouched. They aimed at all statements which they called "misrepresentations made to obtain or secure a policy," and declared what should be the effect of these statements, whether the condition in the policy referring to them called them warranties or representations, or without calling them by either name, compendiously declaring that they should, if not true, avoid the policy whether material or not.

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The demurrer to the first four counts in the answer is sustained. Judgment accordingly; KREKEL, J., concurs.

NOTE.—On the trial the Circuit Judge, with the concurrence of Judge Krekel, made the following observations to the jury as to the purpose, scope and meaning of the Act of March 23, 1874:

"The statute was intended to provide a remedy for what was frequently productive of injustice arising out of the practice of the companies to put to the applicant for an insurance a great variety and number of questions, some of which were material, and some of which very remotely bore upon the proposed risk, and then by a sweeping provision or condition in the policy, declaring that if *any one* answer was untrue, it should avoid the policy, and the courts had held that such provisions were valid and that in such case the policy was void, whether the answer which proved to be untrue was material to the risk or not, and whether such answer was intentionally untrue or was the result of an innocent mistake.

But it still remains true, notwithstanding the statute, that the contract of insurance is imminently one which pre-supposes and requires good faith, honest representations and fair conduct on the part of both parties, of the persons who obtain the insurance and the company which grants the insurance. For a comparatively small premium, the company agrees to pay on the contingency of death a large sum of money. This feature of the business of insurance tempts to perpetration of frauds on the companies. It is to the interest of all that fraud should never succeed. It can not, we think, be supposed that the Legislature of Missouri, in the passage of the Act of March 23, 1874, intended to give any sanction or protection to fraudulent practice against the companies; but their intention was to extend protection to the extent therein provided, against the usual conditions in insurance policies, and to extend this protection in favor of persons who had in good faith, and without any fraud on their part or intentional misrepresentation with a view to deceive effect insurance, by providing that in such cases immaterial representations, or those which proved to be immaterial, should not avoid the policy. It is our opinion, therefore, that the remedial provisions of the statute of March 23, 1874, do not extend to cases where the "representations made in obtaining or securing the policy,,' were knowingly false and made with a view to mislead or deceive the company. As to such representations the statute does not change the law, and therefore, if the said John H. White untruly answered in the application that he had never been addicted to the use of alcoholic beverages or opium, and untruely answered that he had not been attended by a physician for a long time, and these answers, or either of them, were known to him to be untrue at the time they were made, and were made to deceive and mislead the company, then the policy is avoided and there can be no recovery thereon, although the matter so untruthfully answered did not contribute to his death. But if these answers in the application were made in good faith—if when made, the said White supposed they were true, and did not intend to deceive, then, under the statute, the mere fact that they were not true does not defeat the policy; it must be further shown the matter misrepresented contributed to produce or hasten death."

ABSTRACT OF DECISIONS OF SUPREME COURT OF MISSOURI.

October Term, 1877.

HON. T. A. SHERWOOD, Chief Justice.
" WM. B. NAPTON, }
" WARWICK HOUGH, } Associate Justices.
" E. H. NORTON, }
" JOHN W. HENRY, }

INDICTMENT.—On indictment under sec. 33, 1 Wag. 450, it is unnecessary that the offense was committed "wilfully, intentionally, with malice, with a deadly or dangerous weapon, or under circumstances which, if death had ensued, would have constituted murder or manslaughter." Opinion by SHERWOOD, C. J.— *State v. Moore.*

BILL OF EXCEPTIONS—PRACTICE.—Mere reference to the page of the transcript will not answer. The motion for a new trial must be *incorporated* in the bill of exceptions; and there being no error in the record proper, the judgment is affirmed. Pac. R. R. Co. v. Opel, decided at this term. Opinion by SHERWOOD, C. J.—*Collins v. Bording.*

BILL OF EXCEPTIONS—PRACTICE.—Under the statutory rule as released by the decisions of this court, a bill of exceptions may, by consent of parties entered of record, be filed within the time agreed upon but not afterwards, and if filed after the expiration of that time will not be noticed by this court. Opinion by SHERWOOD, C. J.—*Clark v. Bullock.*

FRAUDULENT CONVEYANCES. — A conveyance in fraud of creditors can not be impeached by the grantors therein, or their administrators; McLaughlin v. McLaughlin, 16 Mo. 242; Ames v. Finley, 18 Mo. 375; George v. Williams, 26 Mo. 190, and when a probate court, at the instance of the grantor's administrator, ordered a sale of lands conveyed by the intestate, on the ground that his deeds thereto were fraudulent, the purchaser at the sale acquired no title. Opinion by HENRY, J.—*Hall v. Callahan et al.*

EQUITABLE ESTATE—LACHES.—Equitable interests in real estate may be transferred by assignment. 2 Wag. Stat. p. 999, § 2; Smith v. Kennett, 18 Mo. 154; Lumley v. Robinson, 26 Mo. 364; Adams v. Cowhard, 30 Mo. 458; Morgan v. Bouse, 53 Mo. 219; Street v. Lop, 62 Mo. 229. In computing the statute of limitations, and in considering the question of alleged laches, the time covered by the war is to be deducted in the case of one resident in the confederate states. Douthett v. Stinson, 63 Mo. 268. Opinion by SHERWOOD, C. J.—*Metlon v. Smith.*

GARNISHMENT — LIABILITY OF GARNISHEE. — A garnishee is only liable to the creditor to the same extent that he is liable to the debtor, and can not be placed in a worse condition by the garnishment than he would have been if sued by the debtor himself. Where a lessee is garnished for rent in arrears, he can not be compelled to pay the rent on garnishment and leave taxes, which are a lien on the leased property, unpaid, whether there is an express contract in the lease for the payment of taxes or not, the lessor being insolvent. St. Louis v. Regenfus, 18 Mo. 145; Forebaugh v. Stone, 36 Mo. 114; Scales v. Southern Hotel Co., 37 Mo. 524. Opinion by HENRY, J.—*McPherson v. A. & P. R. R. Co.*

ATTACHMENT BONDS—SET-OFF.—The statute, 1 W. S., p. 183, § 12, which authorizes a set-off in favor of the securities on an attachment bond "against the party to whose use the suit is brought, with the same effect as if such party were the plaintiff," does not authorize the setting up of unliquidated damages as a set-off. The petition states a sufficient course of action, although the bond sued on was not filed with the petition. Burdsall v. Davis, 58 Mo. 158; Rothwell v. Morgan, 37 Mo, 107; Han. & St. J. R. R. Co. v. Kundson, 62 Mo. 569. When an instrument in the form of a bond has not the word "seals" in the body of it, it is not a bond, and the rights acquired by the plaintiff by an instrument not authorized by law could not be abrogated by one wholly unauthorized by law, even if substituted as an "amended bond" for the original. Opinion by SHERWOOD, C. J.—*State to the use of Gilbert v. Eldridge.*

FIXTURES.—The law in regard to fixtures is in a somewhat chaotic state. There is a most embarrassing conflict in the adjudged cases. The question of fixture or no fixture does not depend entirely upon the intention of the parties, nor entirely upon intention with which the thing is placed upon the land. Snedeker v. Waring, 2 Kernan, 178; Sopp v. O'Connor, 16

Ia. 422; Cole v. Stewart, 11 Cush 182. The fact that a building is erected as a temporary building, with an intention to ultimately remove it, is not decisive of the question whether it becomes a fixture or not, nor does the manner in which the building is put upon the land determine it. Butler v. Page, 7 Mich. 42; Leaf v. Hewett, 1 Ohio St. 511. Where the question is between the mortgagor and mortgagee, a building placed on the land by the mortgagor is a fixture, and the removal of it may be restrained by injunction, notwithstanding the solvency of the party, if the removal would cause injury for which damages in money are not an adequate compensation. Opinion by HENRY, J.—*State Sav. Bank v. Kercheval et al.*

MECHANIC'S LIEN — EJECTMENT.— A mechanic's lien, when properly prosecuted and enforced, relates back to the commencement of the work out of which it grew, and the purchaser at an execution sale on execution issued on the judgment acquires a better title than the grantees of the owner in deeds of trust or other conveyances made after the work was begun. Opinion by HENRY, J.—*Heim v. Vogel.*

APPEAL — PRACTICE — PARTNERSHIP. — Wherever one is properly made a party (although not a necessary party), in order that he may be bound by the judgment rendered, he has the right to appeal from the judgment. When a contract is made with two only, evidence is not admissible to show that a third person is jointly interested with them, as against the other party to the contract. Partnership effects cannot be taken to pay the individual debts of the partners. Opinion by HENRY, J.—*Hilliker v. Francisco et al.*

HOMESTEAD—DOWER.—A widow, upon the death of her husband, takes the same homestead rights of which he died seized, and the homestead estate is not inconsistent with her estate of dower, Where her dower has been assigned, she may afterwards have her homestead set off, and her estate can not be defeated, except by some act of her own, which may estop her from asserting her rights. The failure of the commissioners to set off the homestead when they made admeasurement of dower is not such an act. Doane v. Doane's Heirs, 33 Ver. 650; Marks v. Capen, 5 Allen, 146; Mercies v. Chace, 11 Allen, 194; Bates v. Bates, 97 Mass. 375; Wright v. Dunning, 46 Ia. 272. Opinion by HENRY, J.—*Gregg v. Gregg.*

JUDGMENTS NUNC PRO TUNC.—When a proper judgment was rendered, and a judgment *nunc pro tunc* was afterwards entered, the defendant not being in court, the second judgment is a nullity, and the execution issued on it is void. But the original judgment was not vacated by the entry *nunc pro tunc*, and an execution having been issued on that judgment, and returned not satisfied, the plaintiffs were fully warranted in proceeding upon the "forthcoming bond" in the attachment Notwithstanding the cases of Sanders v. Ohlhausen, 51 Mo. 163, and also Price v. Roctrell, 50 Mo. 500, we think that an attachment under section 26, p. 881, may be levied upon the crops grown on the premises, as well as upon other "personal property of the person liable." and if there is any doubt upon this question it is dispelled by section 31 of the same statute. Opinion by HENRY, J.—*Hubbard v. Moss, Ex'r.*

PARTIES — FRAUDULENT CONVEYANCES. — When plaintiff seeks to enforce a vendor's lien against lands which had been sold by vendor's administrator and taken possession of by the purchaser, they have an interest in the land which entitles them to become parties to the suit, and they may defend by showing that the sale out of which the fraudulent lien arose was fraudulent and void; that no money was agreed to be paid, and no lien created, and that the conveyance was made to defraud creditors, and without consideration. But another defendant, who claims part of the land under the fraudulent deed, can not defend by the same proof. [Judge Henry expresses his individual dissent from the doctrine laid down in Hamilton v. Scott's Adm'rs 25 Mo. 166: Fenton v. Haw, 38 Mo. 410; and Harwood v. Knapper, 50 Mo. 456.] Opinion by HENRY, J.—*Chapman Adm's. v. Callahan.*

HOTCH-POT—ADVANCEMENTS—EVIDENCE.—A voluntary conveyance of land to a child by a parent is *prima facie* an advancement, and upon distribution of the estate must be brought into hotch-pot. Bringing into hotch-pot, under our statute, means only that the estimated value shall be charged to the party who received it—*i. e.*, the value when it was given. Nelson v. Wyan, 21 Mo. 352; Grattan v. Grattan, 18 Ill. 167; Oyster v. Oyster, 1 S. & R. 422. When the party against whom it is alleged that he got the land by way of advancement, proves that he entered the land in his own name, and a patent issued to him for it, the declarations of the father, made to third persons, are not admissible in evidence, and the father's declarations, made to the son to prove that the father furnished the money to enter the land, should be received with great caution. But if it be proved that the father did furnish the money, the son can only be charged by way of advancement with the amount furnished, without interest. Opinion by HENRY, J.—*Ray v. Loper et al.*

ABSTRACT OF DECISIONS OF SUPREME COURT OF INDIANA.

May Term, 1877.

HON. SAMUEL E. PERKINS, Chief Justice.
" HORACE P. BIDDLE,
" WILLIAM E. NIBLACK,
" JAMES L. WORDEN,
" GEORGE V. HOWK,
} Associate Justices.

ASSUMPTION OF DEBT BY ANOTHER.—A sold B a tract of land, taking B's note and mortgage for the purchase-money. B then sold the land to C, who assumed and agreed to pay the mortgage debt. C failed to pay said debt to A, whereupon B paid it and then sued C on his promise to pay the debt to A. *Held*, B could maintain the action and recover the amount due on the note with interest and attorney's fees provided for by the note. 10 Paige, 595; 2 Denio, 595; 2 Barb. Ch. 618. Opinion by NIBLACK, J. — *Josselyn et al. v. Edwards.*

TENANT IN COMMON — TORTIOUS SALE. — The sale by one tenant in common of an article of personal property and the appropriation of the proceeds of the sale to his own use, without the knowledge or consent of his co-tenant, is a tortious act, and an action for conversion—trover at common law—will lie against the tort-feasor. 43 Ind. 248. Had the defendant been a partner instead of a tenant in common the sale might have been good, and the defendant liable only to account for the proceeds. Opinion by PERKINS, C. J.—*Collins v. Ayers.*

TAX DEED — EVIDENCE. — A tax deed is evidence only of the facts recited in it, and unless the deed shows that the personal property of the owner of the realty was sold for the taxes due before the sale of the realty, or that personal property could not be found, proof *aliunde* of such facts must be given on the trial before the tax deed is of any force as evidence of title. A tax deed is properly excluded as evidence of title, unless an offer is made to prove that the sale on which the deed was given was legal. Opinion by PERKINS, C. J.—*Ward v. Montgomery.*

OFFICIAL BONDS—STATUTE OF LIMITATIONS.—Suits against the makers of official bonds must be commenced within three years from the time the cause of action

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accrued. In a suit on the bond of a township officer, the relator is the real plaintiff, and where a suit is brought by a plaintiff who has no cause of action and is dismissed from court and a new complaint, on the relation of a new party, is substituted for the original one after the expiration of three years from the time when the cause of action accrued, such suit can not be regarded as having been commenced by the former relator, and is barred by the statute of limitations. 1 McLean, 85: 6 Pet. 62. Opinion by PERKINS, C. J.—*Hawthorn et al. v. The State, ex rel. Harpin.*

RIGHT OF JUDGMENT-PLAINTIFF TO REDEEM FROM SALE ON HIS OWN JUDGMENT.—The facts stated in the complaint were as follows: That Allen Green held a note and mortgage on Clarence E. Doane, on which he procured a decree of foreclosure and an order for the sale of the mortgaged property, and judgment over for any balance that might remain unpaid after the sale of said property; that the property, as sold upon decree to McDonald, leaves $300 thereof unpaid by the proceeds of the sale; that the purchaser received the certificate of sale from the sheriff; that within 3 months after the sale, the plaintiff, Green, tendered to said McDonald the amount paid by him at the sale for the land and ten per cent. interest thereon and costs, and demanded the certificate of sale; that the money was refused by McDonald, whereupon Green paid the money into the clerk's office for him; that Doane, the judgment debtor, is insolvent, etc. The court below sustained a demurrer to the complaint. *Held*, that this was error. The language of the statute is, that "any mortgage or judgment creditor, having a lien upon the same, may redeem such real property or interest therein at any time within one year," etc. Green was a judgment creditor and had a lien on the premises. 34 Ind. 57. The court will give the statute a liberal construction. 41 Ind. 399. The judgment plaintiff had a right to redeem from his own sale. Opinion by PERKINS, C. J.—*Green v. Doane et al.*

ABSTRACT OF DECISIONS OF SUPREME COURT OF WISCONSIN.

August Term, 1877.

HON. E. G. RYAN, Chief Justice.
" ORSAMUS COLE, } Associate Justices.
" WM. P. LYON, }

DISMISSAL OF APPEAL — VACATING JUDGMENT TAKEN BY DEFAULT.—An appeal from a justice's judgment may properly be dismissed on the consent of the parties appellant, especially where they are the only parties who defended the action before the justice. 2. It is error to relieve from a judgment by default without tender of a verified answer, even where there is an affidavit of merits. Opinion by LYON, J.—*Howey v. Clifford, imp.*

EJECTMENT—COMPLAINT.—1. In every action to recover real property brought under the statute the complaint must contain the averments required by sec. 4, ch. 141, R. S. 2. The complaint in ejectment herein alleges that A. is the owner in fee simple of the land described; that in 1874 A. let the premises to B. for five years; that subsequently B. assigned the lease to C., who entered into possession; that C. afterwards assigned the lease to plaintiff; and that plaintiff is entitled to the possession, which defendant unlawfully withholds. *Held* bad on demurrer, because, while it needlessly pleads plaintiff's paper title, it does not plead the estate claimed, as the statute requires. Opinion by RYAN, C. J.—*Haight v. Clifford.*

ESTOPPEL—CHATTEL MORTGAGE.—If chattel mortgagees or their agent, knowing that the mortgagors are endeavoring to obtain a loan of money on the property to pay a bill of freight for which it is held, conceal the existence of the mortgage for the express purpose of enabling the mortgagors to obtain such loan, they are estopped from setting up the mortgage against one who, being ignorant of its existence, and being thus intentionally kept ignorant thereof, advances the money to pay the freight on the security of the property, and on the faith that it is unincumbered; and it is immaterial, in such a case, that the mortgagees, or their agent, did not know that the mortgagors were applying for a loan to the particular person from whom such loan was obtained. Opinion by LYON, J.—*McLean v. Dow et al.*

CONSTRUCTION OF STATUTE—SUNDAY TO BE EXCLUDED IN COMPUTATION.—1. Where a statute gives *hours* in which to perform a given act, and does not mention an intervening Sunday, the hours of an intervening Sunday are to be excluded from the computation of time. 2. A justice of the peace has authority by statute to take time to consider upon a cause submitted to him for decision, and the statute provides that "he shall continue the cause to a time to be by him named, and not more than seventy-two hours from the time the cause is so submitted, at which time he shall enter his judgment." A., a justice of the peace, adjourned the same for ninety-six hours actual time, including and intervening Sunday. *Held*, no error. Opinion by LYON, J.—*Meng v. Winkleman.*

TITLE BY DESCENT—STATUTE OF LIMITATION—COVERTURE.—1. Under sec. 38, p. 184, Terr. Sts. of 1839, where a person of full age died unmarried, intestate, and without issue, leaving surviving him his mother, and also brothers and sisters, the mother did not take the whole estate, but only an equal share with the brothers and sisters—the statute having been adopted from Massachusetts with that construction. 2. Prior to ch. 29 of 1872, coverture, existing where title to land accrued, was a "disability which prevented the running of the statute of limitations," notwithstanding the statutes which gave the wife control of her separate estate as if she were unmarried and permitted her to sue alone in respect thereto. 3. Conceding that the wife's seizin in law, or constructive possession, after descent cast upon her, of wild lands, not adversely possessed, would be sufficient to give the husband, upon her death, a tenancy by the courtesy, the fact that during twenty-five subsequent years in which the land was held adversely no action was brought to recover the possession from the adverse occupant, will not bar an action of ejectment by the husband and wife—the statute still permitting the husband to join with the wife in action concerning her separate property. R. S., ch. 122, sec. 15. Opinion by COLE, J.—*Westcott et ux. v. Miller.*

LAND TAKEN FOR RAILROAD PURPOSES—RULE OF APPRAISEMENT—BUILDING ROAD BEFORE CONDEMNATION OF LAND—EVIDENCE.—1. It is the settled law in this State, that the value of land taken for railroad purposes is to be taxed as it is at the date of the appraisement, by the commissioners appointed to appraise the same, and not as at the date of the location of the line by the company; and this rule extends to the appraisement of damages to lands not actually condemned to the use of the railroad company, but which are injured by the location and construction of the railroad over contiguous lands of the same owner. 2. If a railroad company proceeds to construct its road on the land of another without having first acquired the legal right to do so, it is liable in damages as a trespasser, and may be enjoined or ejected. 3. Where the company has built its road over the land of another without authority, and proceedings are afterwards taken to condemn the land, the measure of appraisement is the value which the land taken would now have if the road had

not been constructed upon it, together with the difference between the present value of the owner's contiguous land with the road where it is, and what would have been its present value if the road had not been built. 4. In determining the damages under the above rule, the condition and value of the land as it was just before the road was constructed, may be considered as evidence. Opinion by LYON, J.—*Lyon et rex. v. G. B. & Minn. R. R. Co.*

ABSTRACT OF DECISIONS OF SUPREME COURT OF MICHIGAN.

October Term, 1877.

HON. T. M. COOLEY, Chief Justice.
" J. V. CAMPBELL, } Associate Justices.
" ISAAC MARSTON, }
" B. F. GRAVES, }

EVIDENCE OF BARRED NOTES AND OF NEW PROMISE RECEIVABLE BY STATUTE UNDER THE COMMON COUNTS.—By 2 Comp. L. 1871, § 5777, the plaintiff in all actions on bills of exchange and promissory notes, may declare upon the money counts alone, and such bill or note may be given in evidence thereunder, if a copy of it has been served with the declaration. *Held:* That a declaration containing only the common money counts is sufficient to justify receiving in evidence notes which, on their face, appear to be barred by the statute of limitation; and evidence of a new promise may be given thereunder. Opinion by COOLEY, C. J.—*Michael v. Tuttle.*

ILLEGAL CONSIDERATION—SALE OF SPIRITUOUS LIQUORS—DEFINITION OF DEALER.—This action was on a promissory note, the consideration of which was a stock of spirituous liquors. Defendant proposed to show that the sale was illegal, and the note consequently void, by showing that plaintiff had not paid his tax to the state as a wholesale liquor dealer, and was therefore not at liberty to make such a sale. *Held:* That such evidence would be without force, even in defendant's view of the case, unless it first appeared that the sale was one which only a wholesale dealer could lawfully make. But plaintiff selling in gross his whole quantity of liquors, did not make him a dealer, who is one who makes successive sales as a business; the sale he made indicated his intention not to be a dealer, either by wholesale or retail. Opinion by COOLEY, C. J.—*Overall v. Bezeau.*

SENTENCE OF CONVICT TO UNAUTHORIZED PLACE OF IMPRISONMENT—CONSTRUCTION OF STATUTE.—Defendant was convicted of the crime of larceny from a dwelling-house in the day time, and was sentenced to confinement in the Detroit House of Correction. 2 Comp. L. of 1871, § 8155, empowers the inspectors of the state prison to contract for the confinement and maintenance of a certain class of convicted persons, in the Detroit House of Correction. *Held:* That this power to contract is discretionary with the inspectors, and that until a contract has been entered into there is no authority for sentencing such convicts to be confined in the house of correction, as otherwise the inspectors might be coerced into making a disadvantageous contract, or into contracting where they saw no necessity for doing so at all. Judgment reversed, and the prisoner discharged. Opinion by MARSTON, J.—*Dorsey v. The People.*

BOND FOR COSTS—LIABILITY OF SURETY.—Where a bond given under order of court for costs in a pending cause was worded as though the plaintiff in the cause should become one of its joint obligors, but was only signed by the sureties. *Held*, that the latter when sued on the bond, might show that it was signed on the express condition that the principal should sign it before delivery. The general doctrine that a party entering into contract relations may make the introduction or exclusion of any other a condition of his joining, applies, notwithstanding the fact that here the principal is responsible, independently and at all events. The fact, if conceded, that the liability would be the same with or without the principal's name in the bond, is immaterial. 2. Evidence offered to show that another bond given for costs, though dated and filed on a business day, and apparently executed and caused to take effect on that day, was in fact signed on Sunday, was *held* to have been rightly rejected. As the bond was framed, dated, signed and filed as a bond executed on a week day, as the court received it as such a bond, and as the obligee who relied upon it had no notice or intimation that a signature had been put to it on Sunday, the circumstance that the act of signing occurred on Sunday could not be allowed to invalidate the instrument. It took effect not from the signing, but from delivery or filing. Love v. Wells, 25 Ind. 503; Beitenman's Appeal, 55 Penn. St. 183; Flanagan v. Meyer, 41 Ala. 132; Hilton v. Houghton, 35 Mo. 143; Lovejoy v. Whipple, 18 Vt. 379; Case v. Kendig, 2 Penn. St. 448; Clough v. Davis, 9 N. H. 500; Hill v. Dunham, 7 Gray, 543; Adam v. Gay, 19 Vt. 358; Stockpole v. Symonds, 3 Fortes, 229; Vinton v. Peck, 14 Mich. 282. Opinion by GRAVES, J.—*Hall et al v. Parker et al.*

PARTY ASSERTING ADVERSE RIGHTS CAN NOT RECOVER ON AN IMPLIED CONTRACT TO PAY RENT FOR USE AND OCCUPATION OF LAND.—Action for rent for the use and occupation of land occupied by defendant for its railroad track. There was no express agreement to pay rent, and plaintiff testified that the land was entered upon without his consent or knowledge; that in afterwards consenting to building and grading the road, he told them they were to gain no rights whatever, and that as he knew the land could be taken by legal proceedings, he only expected to get what a jury would give him for the land, unless otherwise agreed. *Held*, 1. That the action for use and occupation of land is based on some contract relation, whereby the parties stand on the footing of landlord and tenant, and rests upon an express or implied agreement to pay rent during the tenancy. Dalton v. Landahn, 30 Mich. 349; Hoysett v. Ellis, 17 Mich. 251. *Held*, 2. That such a relation can not be inferred here. Plaintiff never expected to get rent, or to get any settlement except for the entire appropriation of the land. He repudiated the company's right to remain in possession, and chose to keep himself in an adverse position, and not under contract. A party who asserts adverse rights, can not at the same time claim the existence of rights or duties arising out of a tenancy by contract. Ward v. Warnes, 8 Mich. 508. Opinion by CAMPBELL, J.—*Marquette, H. & O. R. R. Co. v. Harlow.*

INFORMATION—STATUTE OF JEOFAILS—IDENTITY OF ARTICLES ESTABLISHED BY SIMILARITY OF HAND-WRITTEN MARKS THEREON—MISNOMER OF OFFENSE IN SENTENCE.—An information for the statutory offense of breaking and entering a certain store in the night time, with intent to commit larceny therein, was filed September 26, 1876, but by some clerical error gave the time of the alleged offense as December 25, 1876. *Held*, 1. That this defect is cured by statute, 2 Comp. L. 1871, §§ 7923-7940, and that such a statute is not invalid as violating defendant's constitutional right to be informed of the accusation against him. The error could not mislead or prejudice him in any manner. 2. That the identity of certain articles found in defendant's possession with those said to have been stolen, may be proved by examination of the tabs upon them, and by testimony that the marks on those found with defendant and those previously in the store are alike. This is not permitting a witness to testify to hand-

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writing by comparison, for handwriting was not in question here. The marks might be alike, because consisting of the same letters and made by the same person; but any one who had examined them might testify to their similarity and apparent identity, the same as if they had been made by a stamp or other mechanical contrivance. 3. That although the sentence, as entered of record, erroneously designates the offense as burglary, this misnomer is of no importance; for it could not affect defendant's rights, and would be corrected by the record itself, which shows what the offense really was. Opinion by COOLEY, C. J.—*Cole v. The People.*

ABSTRACT OF DECISIONS OF SUPREME COURT COMMISSION OF OHIO.

December Term, 1877.—*Filed November* 21, 1877.

HON. LUTHER DAY, Chief Justice.
" JOSIAH SCOTT,
" D. T. WRIGHT,
" W. W. JOHNSON,
" T. Q. ASHBURN,
} Justices.

BASTARDY.—Proceedings in bastardy can not be maintained on complaint of the mother, under the act of April 3, 1873; "for the maintenance and support of illegitimate children," when the child in question was begotten and born during the lawful wedlock. Judgments of district court and court of common pleas reserved, and complaint dismissed. Opinion by SCOTT, J.—*Haworth v. Gill.*

GUARDIAN'S ACT—SETTLEMENT.—1. The account required by section 14 of the guardian act of April 12, 1858 S. & C. 670, to be rendered by a guardian to the probate court at least once in every two years, when rendered and judicially passed upon by the court, is a settlement within the meaning of section 31 of the act. 2. Under the provisions of said section 31, every settlement so made by a guardian is final between the guardian and ward, unless an appeal is taken therefrom, or the settlement is opened, in accordance with the provisions of the section. Judgment affirmed. Opinion by DAY, C. J.—*Woodmansie v. Woodmansie.*

APPEAL BOND—SURETY—PRACTICE.—A surety in an appeal bond can be held only upon the express words of his contract. The condition in an appeal bond is, that if the said H. shall and do well and truly prosecute said appeal to effect, and pay the full amount of the condemnation money in the district court aforesaid, and costs, in case a decree should be entered therein in favor of said complainants, the appellees, then in such case the above obligation to be void and of no effect, otherwise to be and remain in full force and virtue in law. The decree of the district court found that complainants were entitled to an account against H., and ordered that the cause be referred to a master to be appointed by the court of common pleas to state such account upon the principles of the decree of the district court, and that defendants, including H., pay to complainants the amount found due on said account when ascertained and stated, and costs. The cause went back to the common pleas, the master was appointed, made report, and judgment was entered on the report. *Held*, such judgment of the court of common pleas is not the one provided for in the appeal bond, and the surety is not liable on his undertaking. Judgment affirmed. Opinion by WRIGHT, J.; JOHNSON, J., dissenting.—*Smith v. Huesman.*

WILLS—CONSTRUCTION.—1. In the construction of a will, it is well settled as a paramount rule, in this state, that the intention of the testator, as gathered from the whole will, must control, when such intention is not in conflict with the law or against public policy. 2. Words in a will are to be understood according to their ordinary, natural and legal signification, unless it is manifest from the context, or from other provisions in the will, that the testator has used them in a different sense, and unless the sense in which they were used is clearly apparent. 3. Where real estate is devised to A, an infant son of the testator, in general terms, and the devise is followed by a *habendum* "during his natural life, and to his heirs," together with a limitation over to certain nephews and nieces, in case A shall die within age, and without lawful issue, the word "heirs" in the *habendum* will be construed as a word of limitation, enlarging the life estate to a defeasible estate in fee simple, if such construction be conformable to the general scope of the will, and the apparent scheme of disposition, and consistent with all the other provisions of the will; and where a different construction would leave the fee of the premises undisposed of, in the event of A's death, without issue, after becoming of full age. 4. The 47th section of the wills act of 1840, and the corresponding 53d section of our present wills act, were intended merely to forbid the application of the rule in Shelley's case, where such application would defeat the manifest intention of the testator. Judgment of the court below reversed, and petition of plaintiffs below dismissed. Opinion by SCOTT, J.—*Carter v. Reddish.*

LIFE INSURANCE—FRAUD—EVIDENCE—FORGERY BY AGENT.—1. In an action on a policy of insurance issued by a life insurance company, upon a spurious application made and substituted by its agent for a genuine one made by the assured, the premium rates of the company, when not put in issue in any way whatever, are not competent testimony to show complicity of the assured in the fraud, nor want of knowledge by the company, when the spurious application reached the home office that another and genuine application had been made by the assured, or that the contract was inequitable. 2. In such action it is not competent to inquire of the president and examining surgeon of the company, on the trial, whether, if the true condition of life insured as to health had been known to the company at the time the spurious application was received at the home office, the policy would have been issued. The opinion of the witness, in such case, is not competent testimony. 3. A sub-agent of a life insurance company, appointed to represent it in a particular branch of its business, becomes, in reference thereto, the direct representative of the company, and notice of a fact to him will operate as notice to the company, and it will be bound by acts there done by him in respect to that branch of its business entrusted to him. 4. An action on a policy of life insurance can not be defeated by the company, by showing that the agent of company taking the genuine application imposed upon the company a spurious application, which the company believed to be genuine. 5. In an action on a policy of life insurance, where a genuine application was made by the assured, but issued on one forged by its agent; the company does not make a case for the rescission of the contract and cancellation of the policy, by tendering to the executors of the deceased policy holder the premium received, with interest, as soon as it discovered the fraud. Judgment affirmed. Opinion by ASHBURN, J.—*Mass. Life Ins. Co. v. Eshelman.*

RAILROADS — POWER OF STATE TO REGULATE—1. The state has reserved to itself the right to enact police laws necessary to secure the lives and property of its citizens. 2. Among the powers thus reserved, is that of prescribing reasonable regulations for the government of railroad corporations in regard to the manner in which they shall exercise their corporate franchises in running trains, so as to avoid danger

to the lives and property of its citizens. 3. The act of March 24, 1860, 1 S. & C. 372*a*, entitled "An act to prevent collisions on railroads within the state of Ohio," is a valid exercise of this power to prevent collisions at railroad crossings. 4. Every railroad corporation in this state accepts its charter and maintains and operates corporate property as a railroad, subject to this inherent power in the state to adopt such regulations whenever the public exigencies, and the safety of the community may, in the judgment of the law-making power, require them. 5. Such corporations accept their charter and franchises, and own and use their tracks, subject also to the power of the state to authorize the construction of other railroads across their tracks whenever the public welfare may require. Neither the priority of one charter over the other, nor the prior location or construction of a railroad thereunder affects this right. 6. Under the constitution and laws of this state, the right of one railroad corporation to cross the track of another in constructing and operating its road, is derived by grant of the franchise so to do from the state, and not by purchase or appropriation from the road first located and constructed. The latter has no vested exclusive right to use such crossing for its use, against the right of the public to a crossing. 7. The right of a railroad corporation to hold land is not an unqualified right, but it is limited to the uses and purposes of the corporation, and is to be held for the purposes of the grant for public uses. The title which it has in its right of way, is a qualified title, subject to the equal right of another railroad corporation to cross the same with its track, provided compensation be made as required in the case of individuals for the property appropriated, or the interest therein which is so appropriated. 8. By the terms of said act of 1860, where the tracks of the two railroads cross each other at a common grade, the crossings shall be made, kept up and watchmen maintained, at the joint expense of the companies owning the track. *Held*, that this statute imposes on both companies the expense of making and keeping up such crossing as therein required, without regard to the date of their respective charters, or the location or construction of their respective roads. 9. In a proceeding under the statute by one corporation to appropriate a strip of land across the track of another to be used in common by each as a railroad crossing, at a common grade, the owner of such track has no right to recover as consequential damages the additional expense rendered necessary in operating its road caused by complying with the provisions of said act of 1860. 10. In a proceeding under the statute to appropriate a right of way across the track of an existing railroad, to be used in common as a railroad crossing, the owner of such track is entitled to compensation for the property or interest therein, actually appropriated, and for such consequential damages, not provided for by the act of 1860, as are the direct and proximate consequence of such appropriation. 11. But the jury in estimating these consequential damages can not include the additional expense provided for by said act, nor take into account the detention of trains, loss of future business, nor additional expenses incident to the future exercise of their corporate powers. Judgment reversed and cause remanded. Opinion by JOHNSON, J.—*Lake Shore & Mich. R. R. v. Cin., San. & Clev. R. R.*

E. C. HAMBURGHER, ESQ., Clerk of the Appellate Court for the Third District of Illinois, has issued in pamphlet form the rules of the new court. As we understand it, the judges of this court are appointed by the Supreme Court from the circuit judges. The judges for the third district are Hon. Chauncey L. Higbee, Presiding Justice, and Hons. Oliver L. Davis and Lyman Lacy, Associate Justices.

ABSTRACT OF DECISIONS OF SUPREME COURT OF KANSAS.

July Term, 1877.

HON. ALBERT H. HORTON, Chief Justice.
" D. M. VALENTINE, } Associate Justices.
" D. J. BREWER, }

INFORMATION FOR TRESPASSES ON SCHOOL LANDS.—1. An information sufficiently charging an offense under section 26, chapter 122, laws of 1876, p. 287, to authorize a conviction of a defendant should contain an averment of the amount of damages committed, or the value of the property injured. Opinion by HORTON, C. J. Affirmed. All the Justices concurring.—*State v. Grewell.*

PRACTICE IN ERROR CASES FROM JUSTICES OF THE PEACE.—1. Where an action has been tried in a justices court to a jury and judgment rendered for the plaintiff, and no motion made for new trial, the district court can not, upon a petition in error reverse such judgment on account of the partiality of the justice in his ruling, or for the admission of incompetent testimony against the objection and subject to the testimony of defendant. Opinion by HORTON, C. J. Affirmed. All the Justices concurring.- -*Rice v. Harvey.*

BAIL BONDS IN CIVIL ACTIONS.—1. It is not a fatal defect in an undertaking given under section 511, of the code of civil procedure that it fails to show that the debtor was actually in jail, provided it shows that he had actually been arrested under the execution and was then in the custody of the officer. The word imprisoned as used in said section is broad enough to include any actual arrest and detention by the sheriff, whether in or out of the jail. Lytle Administrator v. Davis, 2 Ohio, 277, disapproved. Opinion by BREWER, J. Affirmed. All the Justices concurring.—*Doyle v. Boyle.*

SHERIFF'S SALE—APPRAISEMENT.—1. Where real estate is attached in an action instituted upon a promissory note of the date of February 1st, 1874, containing no waiver of appraisement and neither the judgment nor the order of sale provide that such real estate shall be sold without appraisement, and the proceedings of the officer making the sale, fail to show any appraisement of the property; *Held*, that the district court erred in confirming the sale of real estate sold under said order of sale without any valuation as required by statute. Opinion by HORTON, C. J. Reversed. All the Justices concurring.—*Moore v. Cutler.*

INSUFFICIENT FINDINGS—EJECTMENT.—1. Where a case is tried by the court without a jury, and the findings of the court are not sufficient to sustain a judgment: *Held*, That it is error for the court to render judgment, upon such findings, against a party, over his objections and exceptions. 2. In an action in the nature of ejectment the plaintiff may recover any part or portion of the land which he claims, the verdict and judgment corresponding with the proof in the case. Opinion by VALENTINE, J. Reversed. All the Justices concurring.—*Everett v. Lusk.*

DIVORCE—ALIMONY.—1. Upon granting a divorce to the husband by reason of the fault or aggression of the wife, the court has power to decree the sum allowed as alimony to the wife a lien upon the real estate of the husband, and *held*, that under such a decree the premises occupied by such husband and wife as a homestead, at the date of the decree of divorce, may be sold in satisfaction of said lien. 2. Under the provision of the statute that the court, in granting a divorce, may give to the wife such share of her husband's real or personal estate as shall be just and reasonable; *Held*, not an abuse of discretion for the court to allow to the wife a specific sum in money, and to provide as a pen-

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alty in the decree that, if the same is not paid at once, it shall draw interest at the rate of twelve per cent. per annum until paid. Affirmed. Opinion by HORTON, C. J.; all the justices concurring.--*Blankenship v. Blankenship.*

INSUFFICIENT RECORD.—Where neither the full proceedings of the court below, nor a "case made," is brought to the supreme court, but only a mere bill of exceptions omitting much of the proceedings of the court below; *Held*, that the supreme court will not reverse the judgment of the court below on such bill, where the same omit smuch of the proceedings of the court below, which might explain the supposed erroneous rulings contained in such bill, or might show that none of said supposed erroneous rulings affected predjucially any of the substantial rights of the plaintiff in error, even if said rulings might apparently seem to be erroneous. Opinion by VALENTINE, J. Affirmed. All the Justices concurring.—*Burns v. Burgett.*

DEFECTIVE RECORD—PRACTICE.—1. Where an attempt is made to question the jurisdiction of the district court for want of sufficient service on the defendant in the said court, and the record brought in this court shows that the clerk of the court below has only certified to this court such portions of the proceedings of the inferior court as the counsel for the plaintiff in error directed to be made out and certified. *Held*, that this court will not presume in the absence of the full proceedings of the district court, that such court acted without jurisdiction of the person of the defendant and *held*, that upon such a record so certified, this court must of necessity affirm the judgment of the court below. Opinion by HORTON, C. J. Affirmed. All the Justices concurring.—*Moore v. Cutler.*

GUARDIAN AD LITEM—PRACTICE—ACTION TO SET ASIDE A WILL.—1. When it is claimed that there was error in appointing a guardian *ad litem* for a defendant alleged to be a minor, and the record fails to show any of the testimony offered on the application by the plaintiff for the appointment of such guardian, and does not purport to contain all offered on the motion to vacate such appointment; *held*, that this court can not adjudge error in making such appointment, or in refusing to vacate it, notwithstanding the claim and the oath of the defendant, that she was of age. 2. In a case tried before a jury, a motion for a new trial must be filed within three days, unless good reason be shown for the delay, or errors alleged in the progress of the trial in the admission of evidence, etc., will be deemed to have been waived. Nesbit v. Hines, 17 Kansas, 316. 3. A petition in an action to set aside a will brought against the sole devisee under the will, and the administrator with the will annexed, which alleges the death of the deceased, his ownership of property, the heirship of the plaintiff, the forgery of the will, a copy of which is given, its probate, and the perjury by which such probate was secured, states a cause of action, and where such petition is met only by a general denial and the verdict is for the plaintiff; *held*, that the court did not err in overruliug a motion for judment in favor of the defendants *non obstante veredicto*. Affirmed. Opinion by BREWER, J.—*Fowler v. Young.*

PRACTICE — CONTRACT TO KEEP UP CATTLE — TRESPASS BY CATTLE—DAMAGES.—1. When no question is raised in the district court as to the misjoinder of two causes of action, such court does not err in any case in adjudicating upon both of such causes of action. 2. Where no objection is made to the introduction of parole evidence to prove the contents of a lost written instrument, it is not error for the court to permit such evidence to go to the jury. 3. Where several persons enter into a written contract, stipulating that each shall keep up his own cattle, and prevent the same from trespassing upon or injuring the crops or hedges of any of the others, for a period of three years, and that in case any injury should occur by reason of the cattle of any one of said persons trespassing upon the crops or hedges of any of the others, and in case the parties themselves could not agree upon the amount of the damages sustained, then, that the question as to the amount of such damages should be submitted to arbitrators consisting of three of the signers to said contract—one of such arbitrators to be selected by each of the parties, respectively, and the third one to be selected by the other two arbitrators, and that the decision of such arbitrators should be final between the parties; *Held*, that such contract is valid and binding. 4. And, in such a case, where the cattle of B., (one of the parties to said contract,) trespasses upon the crops of C. (another of the parties to said contract), and injures said crops, and B., on the demand of C., refuses to pay any damages, and refuses to recognize said contract as having any force or validity; *Held*, that C. may immediately, and without offering to submit the question of damages to arbitrators, commence an action against B. for the amount of such damages. B., by refusing to recognize the validity of said contract, waives his right to have the amount of said damages determined by arbitrators under the contract. 5. And, under said contract, it makes no difference, with reference to C.'s right to recover, whether C.'s crops were fenced or not. 6. Where B.'s cattle trespass upon the crops of C., and C.'s cattle upon the crops of B., these mutual trespasses do not in and of themselves rescind or destroy said contract, or render any of its stipulations inoperative. 6. And where C.'s cattle trespass upon the crops of B., and B. does not claim that his crops were fenced, or that C. drove his cattle on to said crops, or that B. was willing or that C. was unwilling to submit to the question of damages to arbitrators under the contract. *Held*, that B. has no cause of action against C. for said damages; that before B. can have a cause of action against C., in such a case, he must be willing and C. unwilling to submit the question of damages to arbitrators in accordance with said contract. Opinion by VALENTINE, J. Affirmed. All the Justices concurring.—*Berry v. Carter.*

ABSTRACT OF DECISIONS OF SUPREME COURT OF OHIO.

December Term, 1877—*Filed November* 20, 1877.

HON. JOHN WELCH, Chief Justice.
" WM. WHITE,
" WM. J. GILMORE,
" GEO. W. MCILVAINE,
" W. W. BOYNTON,
} Associate Justices.

MORTGAGE NOT A "WRITTEN INSTRUMENT" UNDER THE CODE.—A mortgage given to secure the payment of a promissory note, is not a "written instrument for the payment of money only," within the meaning of section 118 of the code. And cause of action, in a pleading, founded upon such mortgage, can not be verified by an agent or attorney of the party on the ground that such instrument is in his possession. PER CURIAM.—*Purdon v. Carrington.*

CHALLENGE—JUROR—APPEAL.—1. On the trial of the validity of a challenge alleged against a juror, other than a principal cause of challenge, a sound discretion is allowed to the court. 2. If a jurror has formed or expressed an opinion in a relation to a portion of the facts embraced in the issue, but not upon the whole issue, and otherwise, stands indifferent between the parties, the allowance or refusal of the challenge is within the discretion of the court. Motion overruled. Opinion by MCILVAINE.—*Dew v. McDevitt.*

PURCHASE OF GOODS ON CREDIT WHEN FRAUDULENT.—1. A contract for the purchase of goods on credit, made with intent on the part of the purchaser not to pay for them is fraudulent; and if the purchaser has no reasonable expectation of being able to pay, it is equivalent to an intention not to pay. 2. But where the purchaser intends to pay and has reasonable expectations of being able to do so, the contract is not fraudulent, although the purchaser knows himself to be insolvent and does not disclose it to the vendor who is ignorant of the fact. Motion overruled. Opinion by MCILVAINE, J.—*Talcott v. Henderson.*

BASTARDY ACT— PRACTICE — CONTINUANCE.—In proceeding under the bastardy act, 70 O. L. 111, the transcript and recognizance were filed at the term of the court to which the defendant was recognized, but there was no order continuing the cause either at that term or next term thereafter, and at the next, being the third term, the recognizance was forfeited, the cause tried, and a verdict of guilty rendered and judgment pronounced against the defendant in his absence. *Held:* That there being no continuance of the cause at the first term, the recognizance did not bind the defendant to appear at any subsequent term, and the trial in his absence was unauthorized. Opinion by GILMORE J.—*Grieve v. Freytag.*

ELECTIONS—CERTIFICATE OF CLERK.—1. Under section 36 of the act to regulate the election of state and county officers S. & S. 333 the declaration of the clerk and justices, showing who were duly elected, ought to be certified in writing and the certificate ought also to show that the day on which the declaration was made. 2. Where the certificate shows the date at which the declaration was made, the time within which an appeal may be taken by a candidate or an elector, is to be counted from such date. 3. If, taking the certificate in connection with the returns and abstract, there is no ambiguity or uncertainty as to the date of the declaration, parol evidence, in the absence of fraud, is inadmissible for the purpose of fixing the time for taking an appeal. Opinion by WHITE, J.—*Taylor v. Wallace.*

ABSTRACT OF DECISIONS OF SUPREME JUDICIAL COURT OF MASSACHUSETTS.

March Term, 1877.

HON. HORACE GRAY, Chief Justice.
" JAMES D. COLT,
" SETH AMES,
" MARCUS MORTON,
" WILLIAM C. ENDICOTT,
" OTIS P. LORD,
" AUGUSTUS L. SOULE,
} Associate Justices.

BANKRUPTCY — APPORTIONING RENT. — Under §§ 5071 and 5119 of the U. S. Rev. Stats., a lessor, where the rent is payable at stated periods, and the debtor has filed a petition in bankruptcy, followed by an adjudication, between such periods, is only entitled to recover in an action at law, that proportion of the rent which has accrued subsequently to the filing of the petition. Opinion by MORTON, J.—*Treadwell v. Marden.*

EXCHANGE OF ESTATES—APPROPRIATION OF PAYMENTS.—The plaintiff, owning an estate in B., subject to two mortgages, amounting to $22,000, and the defendant, owning an estate in C., entered into an agreement, which provided that defendant should convey the estate in C. to the plaintiff, and in payment therefor the plaintiff should convey to the defendant the estate in B., subject to the two mortgages, and also give to the defendant mortgages on the C. estate to the amount of $11,500, and "all taxes, insurance and interest to be adjusted to September 1, 1875." When the parties met to execute the deeds and carry out the agreement, it was found that the taxes on the B. estate, and the interest on the mortgages for $22,000, estimated *pro rata* to September 1, amounted to $759.53; against this sum the insurance on the B. estate, which was assigned to defendant, and the taxes on the C. estate, also estimated *pro rata* to September 1, were offset, and it was agreed that there was a balance of $600 against the B. estate to be paid by plaintiff. The deeds were passed, and the sum of $600 was paid by plaintiff to defendant. The defendant denied that he was bound by the agreement to apply the $600 to the payment of interest and taxes on the B. estate, and that if he did so agree that it was without consideration. *Held*, that the fair construction of the agreement is that any sum received by either party on the adjustment of taxes, insurance and interest, as of September 1, must be devoted by the party receiving it to the purpose for which it was made. Opinion by ENDICOTT, J.—*Williams v. Allen.*

ARBITRATION — BOND — PENALTY — COSTS.— The plaintiff and defendant, being owners of adjoining lots of land, agreed to submit to arbitrators the question of the true location of the boundary line between them, and at the same time the defendant executed a bond conditioned that he should abide by the award of a majority of the arbitrators, and should execute to the plaintiff a quit-claim deed of any interest, right or title to any land lying southwesterly of the boundary line, as established by the award, within thirty days after demand therefor. The defendant, after due demand, refused to give such deed, and afterwards brought a bill in equity to set aside the award, which was dismissed, with costs. In a suit upon the bond, it was *held*, that the bond being in the usual form, and containing no express agreement that the sum therein named as the penal sum it is to be regarded as liquidated damages, and there being nothing in the bond, or in the nature of the case, to justify the inference of an intention that such sum should be construed as the stipulated and ascertained damages for a breach, the general rule applies that in bonds of this form the penal sum named is to be regarded as a penalty, and not as liquidated damages. *Held*, further, that the plaintiff is not entitled to recover as damages the expenses incurred in defending the suit in equity, the theory of the law being that the taxable costs awarded to the prevailing party in a suit furnish a full indemnity for all his expenses incurred therein. Pond v. Harris, 113 Mass. 114 and Westfield v. Mayo, 122 Mass. 100, *distinguished.* Opinion by MORTON, J.—*Henry v. Davis.*

FIRE INSURANCE—TITLE TO PROPERTY INSURED—MISREPRESENTATION.—1. In an action upon a policy covering the household furniture, etc., of the plaintiff, it appeared that the title to the property insured was acquired by bill of sale from one G., absolute in form, but intended by the parties only as security for money lent; that at the time of the sale said property was in a dwelling house owned by the plaintiff, but occupied up to the time of the fire by G.; that the parties to the sale went to the house, saw the property, and declared that possession of it was given to and received by the plaintiff; that it remained in the custody of G.; that it was understood that while the latter was to have the use of it, the legal title was to be in the plaintiff. *Held*, that the title passed. The question is not as to the validity of the transfer as against creditors or subsequent purchases. It is sufficient that the plaintiff acquired a title to the specific property insured which had not been defeated, by creditor or otherwise, at the time of the fire, and by the destruction of which he has suffered direct loss to the value of the property destroyed. Haley v. Manuf. Ins. Co., 120 Mass. 296; Eastern R. R. v. Relief Ins. 98 Mass. 423; Williams v. Roger Williams Ins. Co., 107 Mass. 379; Clark v Washington Ins. Co., 100 Mass. 510. 2. In the absence

of any injury or express stipulation on the subject, there was no material concealment or misrepresentation in failing to state that the property was in the custody of a lessee of the plaintiff. It was truthfully described as household furniture, although it was not in his actual custody, or in a house occupied by him. The written part of the policy gives accurately the location of the building in which in was placed. Opinion by COLE, J.—*Little v. The Phœnix Ins. Co.*

CONTRACT — ASSIGNMENT — GUARANTY. — Action upon a written contract and guaranty. It appeared that the defendant corporation made a written contract with S. R. B. & Co., by virtue of which, in consideration of advances made by it to said firm, it became the pledgee of a certain quantity of tobacco; that said contract stipulated that said tobacco was of the market value of $15.000, the property of S. R. B. & Co., free from all incumbrances, and all of the crop of 1871; that thereafter defendant made the following contract in writing and under seal with the plaintiff: "For value received we hereby assign and transfer to the First National Bank of Northampton, all our rights, title and interest in and under the contract (above referred to), together with all the property mentioned herein, or which has been since added under the conditions hereof," which was accompanied with the following guaranty; "The Northampton Loan and Trust Company (now called the Massachusetts Loan and Trust Company), having assigned this day to the First National Bank of Northampton, a certain contract of S. R. B. & Co., with said company, dated December 5, '73, the said company has received therefor, from said bank, $6,646.09 with the guaranty of the company to the bank that the above sum is the amount due on the contract;" that plaintiff took the delivery and possession of the tobacco specified in said contracts and guaranty; that thereafter one L. claimed of the plaintiff seven cases of said tobacco sued plaintiff therefor and recovered damages and costs against him; that defendant was notified and requested to defend said suit, but declined; and it further appeared that sixty cases of said tobacco were not of the crop of 1871, as specified in the contract with S. R. B. & Co., but of the crop of 1870, which was greatly inferior in quality and value. *Held:* That the obvious purpose of the assignment was to substitute the plaintiff's in the place of the original pledgees; that what the defendants undertook to convey was all their right, title and interest in and under the contract, together with all the property therein mentioned. The only express guaranty entered into by them was as to the amount remaining due upon the original contract. If, in addition to this, any guaranty can be said to have been implied, it certainly could not go beyond an assurance that they had not released or impaired any of their rights as pledges, and that, for aught they knew to the contrary, the property was what the contract purported. Addison in Con. § 614. In a conveyance of all a party's right, title and interest in any subject-matter, any warranty, express or implied, must be understood as limited by the granting clause, unless otherwise distinctly provided. Allen v. Holton, 20 Pick. 458; Hoxie v. Finney, 16 Gray, 332. Opinion by AMES, *J.—First Nat. Bank of Northampton v. Mass. Loan and Trust Co.*

NOTES.

THE appointment of Mr. Justice Harlan has been confirmed by the Senate.

A BARRISTER having been pressed by his attorney to ask a witness whether he had not committed a certain offense, did so and was promptly answered in the negative. "Now you have got your answer," said the attorney angrily. "Well, did you not oblige me to put the question." "I did," answered the attorney, "but you had no right to listen to me."

A BILL has been introduced into the House of Representatives by Judge Tipton of Illinois providing: 1. That so much of the third section of the act entitled "An act in relation to courts and judicial officers of the Territory of Utah," approved June 23, 1874, as gives jurisdiction to the probate courts of said Territory in suits for divorce for statutory causes, be, and the same is hereby repealed. 2. That all suits of divorce for statutory causes pending in the probate courts of said Territory, at the time of the passage of this act, shall be removed to the district court having jurisdiction, when said suit shall proceed in like manner as if originally commenced in said district court.

WHEN A new Lord Mayor of London is elected, he is presented to the judges of Westminster Hall. On such occasions, the judges sometimes make speeches on public affairs entirely foreign to their judicial functions and equally foreign, it should seem, to the functions of the Lord Mayor. When the recently elected Lord Mayor was presented to the judges, Baron Pollock of the Exchequer Division made a speech on foreign affairs which has attracted deep attention. The burden of it was that the balance of power in Europe is upset; that England is menaced by a power as great as that wielded by the first Napoleon; that the partition of Turkey is threatened, and with it the empire of England in the East. But of course England would not get frightened at all this. Oh, no. Baron Pollock, although he is decidedly too old for military duty himself, would say with England and America's great dramatist,

"Come the three corners of the world in arms,
And we shall mock them."

And Baron Pollock might have said to the England which looked on placidly while Poland was partitioned, and Schleswig-Holstein, and Hanover, and Alsace and Loraine were successively swallowed up,—adopting with slight variation the language of the Huguenot poet,—

"In the fall
Of Turkey, think of thine, despite thy watery wall!"

THE MEMOIRS and letters of Charles Sumner, recently published, justify the assertion that Sumner saw more of the English bench and bar than any stranger had ever seen, and more, indeed, than many an English lawyer. His recollections of Brougham alone would fill a moderate-sized pamphlet. Sumner heard the latter despatch cases in the Privy Council, and found him "electric" in the rapidity of his movements. He looked into the very middle of a case when counsel were just commencing, and at once said: "There is such a difficulty [mentioning it] to which you must address yourself, and if you can't get over that I am against you." In this way he saved time and gratified an impatient spirit, but of course offended counsel. Moreover, Brougham was restless during an argument, wrote letters, and, as Baron Park assured Sumner, dashed off his well known article on George IV. for the *Edinburg Review* at the table of the Privy Council. Another acquaintance, a barrister on the Northern Circuit, said that he once stood behind his Lordship and saw him scrawl a Greek ode on his desk in court. In regard to Scarlett's failure on the bench, Sumner heard, indeed, but one opinion. Of the son-in-law, then Attorney-General, afterwards Lord Campbell, we are told that he was not much liked at the bar, though men bowed to his abilities. "We pronounce his name wrong," adds Sumner, "in America. All the letters, including the b, are sounded; thus Campbell, not *Camell*, as we say." Of Wilde, afterwards Lord Truro, we hear a great deal. He began as an attorney, and, after his transfer to the bar, committed one of those moral delinquencies which are so severely visited in England. In some way Wilde took advantage of a trust relation and purchased for himself. He was at once banished from the Circuit table, and a long life of laborious industry, attended by the greatest pecuniary success had not yet placed him in social communion with his profession. "He does not mingle with the bar," writes Sumner, "or, if he does, it is with downcast eyes, and with a look which seems to show that he feels himself out of place. It is not improbable that the Government, in their anxiety to avail themselves of his great powers, may forget the past, but society will not." Oddly enough, Sumner found Wilde in conversation to entertain very elevated views of professional conduct. He should never hesitate, he said, to cite a case that bore against him, if he thought the court and opposite counsel were not yet aware of it.